LIBRARY
SUPREME COURT, U. S.

No. 73-760

Supreme Court, U. S.
FILED
NOV 12 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

HENRY L. TOMOW, SR., ET AL.,

Petitioners,

vs.

MENOMINEE ENTERPRISES, INC., ET AL.,

Respondents,

and

N. E. ISAACSON & ASSOCIATES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

JOSEPH F. PRELOZNIK
MARY VAN GEMERT
520 University Avenue
Madison, Wisconsin 53703
Counsel for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement of the Case 3

Historical Background 3

The Process of Termination 3

Sale of Tribal Lands to Non-Menominees 6

History of Litigation 8

Reasons Why the Writ Should Be Granted 11

Conclusion 26

Appendices

A. Opinion Below of Supreme Court of Wisconsin June 29, 1973 ..... App. 1

Wisconsin Supreme Court Opinion on Motion for Rehearing ..... App. 29

B. Opinion of Menominee County Circuit Court, October 26, 1972 ..... App. 30

Opinion of Menominee County Circuit Court, July 24, 1972 ..... App. 36

C. Findings of Facts and Conclusions of Law of Menominee County Circuit Court, November 16, 1972 ..... App. 57

D. Interlocutory Judgment of Menominee County Circuit Court, December 1, 1972 ..... App. 72

E. Title 25, United States Code, Sections 893, 896 ..... App. 74

TABLE OF CITATIONS

Cases

PAGE

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) 25

Carpenter v. Shaw, 280 U.S. 363 (1930) 19

Cherokee Intermarriage Cases, 203 U.S. 94 (1906) ..19, 20

Choate v. Trapp, 224 U.S. 665 (1912) 19

Choctaw Nation v. United States, 318 U.S. 423 (1943) .. 19

Marlin v. Lewallen, 276 U.S. 58 (1928) 19, 20

Mattz v. Arnett, —— U.S. ——, 37 L. Ed. 2d 92 (1973) 19, 25

Menominee Tribe of Indians v. United States, 101 Ct. Cl. 10 (1944) 21

Menominee Tribe of Indians v. United States, 179 Ct. Cl. 496 (1967), 391 U.S. 404 (1968) 3, 11, 12, 18

Poafpybitty v. Skelly Oil Co., 36 U.S. 351 (1968) 25

Seminole Nation v. United States, 316 U.S. 286 (1937) 21

Seymour v. Superintendent, 390 U.S. 368 (1962) 25

Squire v. Capoeman, 351 U.S. 9 (1956) 19

Tulee v. State of Washington, 315 U.S. 681 (1942) 19

United States v. Payne, 264 U.S. 446 (1924) 19, 20

United States v. Shoshone Tribe, 304 U.S. 111 (1938) 12, 19

Williams v. Lee, 358 U.S. 217 (1959) 25

Winters v. United States, 207 U.S. 564 (1908) 19, 20

Treaties

PAGE

Treaty of Wolf River, May 12, 1854, 10 Stat. 1064 ....3, 11, 12

Statutes

Menominee Termination Act of 1954 as amended 83-399 (68 Stat. 250) June 17, 1954, 25 U.S.C. Sections 891-902 .....2, 3, 11

25 U.S.C. Section 893 .....*passim*

25 U.S.C. Section 896 .....*passim*

28 U.S.C. Section 1257(3) 2

Others

99 Cong. Record, p. 9746 (August 24, 1953) 14

Proclamation of Final Closure of Menominee Tribal Roll, Fed. Reg. of December 12, 1957, pp. 9951-9972 .. 4, 22

Proclamation of the Secretary of the Interior, 26 Fed. Reg. 3726 (April 29, 1961), Plan for the future control of Menominee Indian tribal property and future service functions .....*passim*

Menominee Enterprises Articles of Incorporation, Article XII, 26 Fed. Reg. 3726, 3730 (April 29, 1961) 6-7, 8, 14, 16, 17, 18, 20

Menominee Common Stock and Voting Trust Agreement, 26 Fed. Reg. 3726, 3734-3738 (April 29, 1961) 5, 15, 17

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO.

HENRY L. TOMOW, SR., ET AL.,
Petitioners,

vs.

MENOMINEE ENTERPRISES, INC., ET AL.,
Respondents,

and

N. E. ISAACSON & ASSOCIATES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioners, Henry L. Tomow, Sr., et al., pray that a writ of certiorari issue to review the final judgments of the Supreme Court of the State of Wisconsin, entered in this case on June 29, 1973, and August 14, 1973.

OPINIONS BELOW

The unreported opinion of the Trial Court appears post, pages 36-56, Appendix B. The opinion of the Supreme Court of the State of Wisconsin entered June 29, 1973, and reported at 60 Wis. 2d 1 (1973), 208 N.W. 2d 824, is reproduced post, pages 1-28, Appendix A. The

unreported opinion of the Supreme Court of the State of Wisconsin on petition for rehearing is reproduced post, page 29, Appendix A.

JURISDICTION

The opinions of the Supreme Court of the State of Wisconsin, were filed on June 29, 1973, and August 14, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the Wisconsin Supreme Court err by failing to apply the rule of liberal construction which must be applied to the federal government's dealings with the Indians, when it ruled that the Menominee Termination Plan did not reserve to tribal members the right to approve sales of tribal lands to non-Indians, contrary to the express intent of the tribe and the Secretary of the Interior when they approved the Plan pursuant to the mandate of 25 U.S.C. §896?

2. Did the Wisconsin Supreme Court err when it concluded that the tribe's approval of the Termination Plan met the requirements of 25 U.S.C. §893 respecting procedures to be followed in alienating individual tribal members' ownership interests in the tribal assets?

STATUTES INVOLVED

Menominee Termination Act of 1954 as amended P.L. 83-399 (68 Stat. 250) June 17, 1954, 25 U.S.C. §§893 and 896, as made effective by Proclamation of the Secretary of the Interior, April 29, 1961, 26 Fed. Reg. 3726.

STATEMENT OF THE CASE

Historical Background

Since time immemorial the Menominee Indians have lived as a tribe in eastern Wisconsin. In a series of seven treaties the Menominee ceded over 11 million acres of land to the United States and acknowledged themselves to be under the protection of the United States. Finally, in the 1854 Treaty of the Wolf River they received "a permanent home," composed of 276,480 acres "to be held as Indian lands are held," including the land which constitutes the subject matter of this controversy. After a cession of a portion of these lands in 1858 for the use of the Stockbridge-Munsee Indians, these lands were held intact by the United States government in trust for the tribe until April 30, 1961, when the Secretary of the Interior promulgated the Menominee Termination Plan, thereby making the Menominee Termination Act fully effective.[1]

The Process of Termination

In 1954, Congress enacted the Menominee Termination Act, 68 Stat. 250, 25 U.S.C. §§891-902, for the purpose of providing "for the orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."[2] Section 893, 25 U.S.C., reproduced in Appendix E, post, provides that the beneficial ownership interest of individual Menominee

---

[1] The facts, *supra*, are based on the opinion of the Court of Claims in *Menominee Tribe of Indians* v. *U.S.*, 177 Ct. Cl. 496 (1967), 391 U.S. 404 (1968).

[2] 25 U.S.C. §891.

Indians in the tribal assets were to become "personal property" as of the Secretary of the Interior's (Secretary) Proclamation of the closing of the final roll of the tribe, and that these interests would be manifested by a Certificate of Beneficial Interest which was to be issued by the tribe. It also provides that such interests would be alienable only in accordance with such regulations as might be adopted by the tribe. Section 896, 25 U.S.C., reproduced in Appendix E, post, required the tribe to develop a plan for the future control of tribal property which was to be approved and promulgated by the Secretary of the Interior, if it conformed to applicable federal law.

Until April 30, 1961, when removal of federal supervision was effectuated, tribal affairs were conducted by the General and Advisory Councils. General Council meetings were open to the entire tribe with all adult enrolled Menominee entitled to vote. The Advisory Council was an elected body that concerned itself primarily with business management of day-to-day affairs. Its action could be overturned by a vote of a General Council or by the Secretary of Interior.[3]

Pursuant to the mandate of 25 U.S.C. §896, the Menominee General Council in November, 1957, created a Coordinating and Negotiating Committee (C & N Committee) and authorized it to develop a Termination Plan such as was called for by the Termination Act itself.

In December, 1957, the Secretary published a Proclamation of Final Closure of the tribal rolls which included 3,270 names.[4] Effective upon this publication, the rights

[3] The facts in this and the following paragraphs are derived from the opinion of the Wisconsin Supreme Court, Appendix A, post, and the citations given.

[4] 22 Fed. Register 9957 (December 12, 1957)

or beneficial interest of each enrolled Menominee in the tribal assets became personal property, were to be evidenced by a Certificate of Beneficial Interest issued by the Tribe, and could be alienated only in accordance with such regulations as the tribe might adopt. 25 U.S.C. §893 [Appendix E, post].

The C & N Committee presented a proposed Termination Plan to the General Council on January 9, 1959. On January 9, 10, and 17, 1959, the tribal members considered the proposed plan for the future control of the tribal assets which consisted of Articles of Incorporation, By-Laws, Voting Trust Agreement, Minors Trust Agreement and Income Bond.[5] A resolution approving the proposed Termination Plan, as amended by those present, was passed January 17, 1959, by the General Council on a vote of 91-16. The Secretary of the Interior approved the Plan and published it in the Federal Register. The Plan published included a preamble and a Certificate of Beneficial Interest which were not part of the Plan approved by the General Council.[6]

Under the terms of the Plan and the Termination Act, a tribal corporation, Menominee Enterprises, Inc., (MEI), was to be formed to hold legal title to and manage the tribal assets, while members of the tribe listed in the final roll held the beneficial ownership interests in the tribal assets. Part of the Plan called for the creation of the "Menominee Common Stock and Voting Trust", com-

---

[5] Minutes of the General Council, Record, pages 633-634.

[6] 26 Fed. Reg., pp. 3726-3755 (April 29, 1961), Compare Record pages cited in Footnote 5, *supra*.

posed of 7 persons, 4 Menominee and 3 non-Menominee. The Voting Trust was formed contemporaneously with the incorporation of MEI in 1961, shortly before Termination became effective, when upon disbursement of $327,000 of tribal funds held by the Secretary, the four members of the C & N Committee subscribed to a single stock certificate representing the 327,000 shares of stock in MEI. The Committee then signed a Voting Trust Agreement by which the single stock certificate was transferred to the voting trustees, who then issued voting trust certificates representing 100 shares of stock in MEI to each tribal member listed on the final roll, excepting minors and incompetents whose certificates, comprising 40% of the total, were turned over to the First Wisconsin Trust Company acting as trustee. The C & N Committee also contemporaneously cancelled the Certificate of Beneficial Interest which the Chairman of the Advisory Council had issued to the Committee.

Sale of Tribal Lands to Non-Menominees

During the General Council meetings in January, 1959, the question of sales of tribal lands to non-Menominee after Termination was discussed, and the tribe approved the language in Article XII of the MEI Articles of Incorporation to cover such a possibility.[7] On August 10, 1967,

---

[7] Article XII reads:

ARTICLE XII—SALE OF LAND

Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation; provided, however, that the board of directors, may mortgage or pledge corporation assets, for such borrowing purposes as it shall deem necessary and advisable, in an amount not exceeding $250,000; and, provided, further, that the board

the MEI Board of Directors, who are elected under the terms of the Plan by the voting trustees, and the trustees, jointly passed a resolution stating in part that MEI was authorized to sell Menominee Indian lands held by MEI pursuant to 25 U.S.C. §§ 896 and 897 and the Menominee Termination Plan to non-Menominee. See companion petition, *Daly* v. *DNR*. Pursuant to this resolution, MEI and N. E. Isaacson, a land developer and artificial lake builder, entered into an agreement whereby they established a joint venture to be known as "Lakes of the Menominees" (LOM). This agreement was given unanimous approval by the voting trustees and LOM undertook a substantial and extensive land and lake development project known as "Legend Lake". MEI received $150 per acre for the 5,170 acres it contributed to the LOM project. To date, approximately 2,000 recreational homesites in the project have been sold to non-Menominee purchasers. MEI's Board of Directors and Isaacson decided by agreement that Isaacson was to be the managing partner and that Isaacson's president and vice-president would have power of attorney to execute all deeds of conveyance from LOM to any purchaser in the ordinary course of business.

(footnote continued)

of directors or the appropriate officers at the direction of the board of directors shall have authority to lease real property other than lands designated as forest lands; and, provided, further, that the board of directors, or the appropriate officers at the direction of the board of directors, shall have authority to sell or to convey to individuals, who were enrolled tribal members under section 893, Title 25 U.S.C. (final roll) or their heirs-at-law, individual parcels which in the aggregate will not exceed 14,500 acres for home sites, agricultural use or other development, which lands shall be zoned for that purpose and shall not include lands designated as forest lands. 26 Fed. Reg. p. 3730 (April 29, 1961). (Emphasis supplied)

History of Litigation

The present action to stop sales of tribal land to non-Menominee was filed in the Circuit Court for Menominee County, Wisconsin, October 25, 1971, by 162 enrolled Menominee Tribal Members against MEI, the officers, directors, and voting trustees of MEI, and N. E. Isaacson & Associates, Inc., MEI's partner in the LOM development.

Petitioner's alleged basically that a part of the Menominee Termination Plan, Article XII of the MEI Articles of Incorporation,[8] required that sales of tribal lands to non-Menominee be approved by two-thirds of the tribal members, and that MEI had sold such land in the past, and was continuing to sell such land through the LOM joint venture without the approval of two-thirds of the tribal members so that such transfers are invalid. Petitioners also alleged in an alternative attack on the land sales that the voting trust had been invalidly established, and, hence, the voting trustees had improperly exercised the voting rights of the Menominee tribal members, and had authorized the sale of tribal land in violation of Article XII of the MEI Charter and petitioners' rights and, therefore, such sales of land were invalid.

The respondents basically admitted that such sales by MEI and Isaacson through the joint venture, LOM, were continuing; that Article XII merely required the approval of two-thirds of the voting trustees, and that although none of the petitioners had entered into a written voting trust agreement conferring upon the defendant

---

[8] Article XII is reproduced at footnote 7, supra.

trustees the right to vote or otherwise represent shares in MEI, that the voting trust was set up pursuant to 26 U.S.C. 896 and the Menominee Termination Plan as published by the Secretary of the Interior and approved by the tribe.

The trial court noted that the case concerned a claim that Indian lands were wrongfully taken,[9] and after considering the Termination Act and Plan, and the circumstances surrounding the adoption of the Plan by the Tribe, it held that the intent of the tribe in approving the language of Article XII was to create a continuing restriction against the alienation of Indian lands to non-Menominees unless two-thirds of the tribal members approved such conveyances.[10] The trial court also ruled that the establishment of the voting trust did not violate state law requiring written agreement by shareholders depositing their interests in such a trust; or the terms of 25 U.S.C. §893, the provision in the Menominee Termination Act which granted tribal members personal property rights in the tribal property as of the closing of the final roll.[11]

Upon Isaacson's and various former MEI directors' and voting trustees' appeal from the trial court's decision, (MEI did not participate in the appeal), the Wisconsin Supreme Court rejected the broad standard of review which was adopted by the trial court. Basing its opinion solely upon the language of the voting trust

---

[9] Appendix B, p. 49, post.

[10] Appendix B, p. 54, post.

[11] Appendix B, p. 46, post.

agreement which was a part of the Termination Plan, it found that such language clearly authorized the voting trustees to approve land sales to non-Menominees.[12] That court also held that the language of Article XII of the MEI Charter was inoperative while the voting trust was in existence.[13]

The Wisconsin Supreme Court also rejected petitioner's alternative argument that the creation of the voting trust failed to meet the requirements of state law, and 25 U.S.C. §§893 and 896, and, therefore, petitioner's 5th and 14th amendment rights to due process and equal protection of the laws were violated.[14]

---

[12] Appendix A, p. 25, post.

[13] Appendix A, pp. 27-28, post.

[14] Appendix A, pp. 22-23, post.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. THE WISCONSIN SUPREME COURT ERRED BY FAILING TO APPLY THE RULE OF LIBERAL CONSTRUCTION WHICH MUST BE APPLIED TO THE FEDERAL GOVERNMENT'S DEALINGS WITH THE INDIANS, WHEN IT RULED THAT THE MENOMINEE TERMINATION PLAN DID NOT RESERVE TO TRIBAL MEMBERS THE RIGHT TO APPROVE SALES OF TRIBAL LANDS TO NON-INDIANS, CONTRARY TO THE EXPRESS INTENT OF THE TRIBE AND THE SECRETARY WHEN THEY APPROVED THE PLAN PURSUANT TO THE MANDATE OF 25 U.S.C. § 896.

In 1968 this Court granted a Writ of Certiorari to determine whether certain hunting and fishing treaty rights reserved to the Menominee tribe by the 1854 Treaty of Wolf River had been abrogated by an Act of Congress, the Menominee Termination Act, 25 U.S.C. §891 et seq. This Court resolved a conflict between the Wisconsin Supreme Court, which had ruled that certain Indian rights were extinguished, and the United States Court of Claims which ruled that in the absence of specific congressional language, federal termination legislation did not abrogate the Menominee treaty rights. This Court affirmed the ruling of the United States Court of Claims. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

Now, five years later, petitioners, individual Menominee Indians, have filed this petition to request this court to once again reverse a determination by the Wisconsin Supreme Court that certain unique Indian rights no longer survive Termination. Five years ago the Indian

treaty rights at issue dealt with hunting and fishing. Today the contested rights concern the Menominee tribal members continuing rights under the provisions of the 1854 Treaty of Wolf River and the Menominee Termination Act and Plan to control their tribal assets, in general, and the sale of their tribal lands to non-Menominees, in particular.

1. By enacting the Menominee Termination Act, Congress guaranteed tribal members the right to continue restrictions on alienation of tribal lands which the Menominee Tribe possessed by virtue of the 1854 Treaty of Wolf River.

The 1854 Treaty of Wolf River gave the land which is the subject of this dispute to the Menominee Tribe "for a home, to be held as Indian lands are held."[15] "Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title."[16] The lands were held in trust for the tribe by the federal government until April 30, 1961, when the Secretary published the Termination Plan and the Menominee Termination Act thereby became effective. This Court in *Menominee Tribe of Indians* v. *U.S.*, 391 U.S. 404, 412 (1968), stated:

> The provision in the Menominee Termination Act (25 U.S.C. §899) that "all statutes of the United States which affect Indians because of their status

[15] See Record, p. 286.

[16] *U.S.* v. *Shoshone Tribe*, 304 U.S. 111, 117 (1938)

> as Indians shall no longer be applicable to the members of the tribe" plainly refers to the termination of federal supervision. The use of the word 'statutes' is potent evidence that no treaty was in mind.

Thus, the Menominees' treaty right to occupy and hold their treaty lands in common were not abrogated by the Termination Act. Congress did not allot the tribal lands, nor did it order the tribe to do so. In enacting the Menominee Termination Act, Congress recognized this treaty right by guaranteeing the Menominee tribal members the right to decide the future control of their tribal property:

> the tribe shall . . . formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under supervision of the United States. . . . 25 U.S.C. §896.

In the Senate floor debates on H. R. 2828, which eventually became the Menominee Termination Act, Senator Watkins, the author of the Act, was asked what the bill provided with respect to the protection of the tribe's property after the Indians were put on their own. Senator Watkins responded:

> The bill provides that they can write into their own agreement, in whatever organization they set up, which will probably be a corporation, a restriction on alienation so that the property cannot be disposed of, or someone cannot take it away from them.

The debate continued:

> Sen. Chavez: That is the point I wanted to make because once in a while when we pretend to give the Indians a little freedom, all we do is open up opportunity for a land grab somewhere. . . .

> Sen. Watkins: It cannot happen to these Indians, because after all is said and done, the ultimate decision will be their own.[17]

This exchange is typical of the entire legislative history of the Termination Act, in that Congress was of the persuasion that the Menominee Tribe had advanced to a point where it was capable of controlling its own assets so that Federal supervision was no longer desirable. Thus, Congress mandated that the tribe itself formulate the plan for future control of the tribal assets, and, thereby, gave the tribe the right to continue restrictions on alienation of tribal lands if it so desired.

2. The trial court recognized petitioners' unique rights to protect their tribal lands from alienation after Termination, and held that the tribal members had explicitly reserved to themselves the right to approve land sales to non-Menominees in Article XII of the MEI Articles of Incorporation, and that such a reservation was approved by the Secretary of the Interior.

In deciding whether to admit evidence of the intent of the Menominee tribe when it approved the Termination Plan, the trial court characterized the case as involving one of the most important problems of Indian law, the illegal taking of Indian lands,[18] and concluded that:

---

[17] 99 Cong. Record, p. 9746 (Aug. 24, 1953)

[18] "Underlying our discussions was an appreciation of the fact that American history is replete with instances where the Indians have claimed that land was wrongfully taken from them." [Appendix B, p. 49, post.]

> Ordinarily our law does not favor restrictions on alienation, and a proper construction of the trust agreement would probably place of the power of sale in the trustees. However, I consider that this is not an ordinary trust agreement but one that requires a consideration of the background and an interpretation of the plan against the proper setting. [Appendix B, pp. 49-50, post]

On the question of the intent to be found in the tribe's approval of the plan, the trial court started with the proposition that it was "basically the plan of the Menominee Indians," and that the Secretary approved the plan under the federal statute if it met certain conditions.[19]

After considering the minutes of the tribal meetings from the formation of the C & N Committee in 1957 through the approval of the Plan in 1959, and the language of the Articles of Incorporation and Voting Trust Agreement which were contained in the Termination Plan, the trial court concluded that by its approval of the Plan, the tribal members had reserved to themselves in the language of Article XII of the MEI Charter, the right to approve sales of tribal lands to non-Menominees:

> I found no discussion in any of the minutes as to whether the trustees would have the right to exercise the authority to sell contained in Article XII during the period that the shares were in trust. I do find contained in all these writings a strong, consistent opposition to the sale of any lands. . . . [Appendix B, p. 52, post]
>
> It seems improbable to me that from all of the evidence that one could conclude that the Menominees ever intended that the trustees should exercise the

[19] Appendix B, p. 50, post.

> power of sale of lands as an ordinary business operation. It is in my opinion out of harmony and out of character with all of the expressed sentiments contained in the tribal minutes. . . .
>
> I am most impressed by the deliberate selection of a very difficult and involved machinery to authorize the sale of land. Acquiring the consent of two-thirds of all the shareholders is so different from the simple matter of securing the approval of the trustees whether it is unanimous, two-thirds or a simple majority. It also appears to me to involve a kind and a quality of consent by the Menominee people which cannot be supplied by a few persons sitting as trustees no matter how conscientious and concerned they are for the well-being of the beneficiaries for whom they are acting. [Appendix B, pp. 54-55, post]

3. The Wisconsin Supreme Court ignored petitioners' rights under the Treaty of Wolf River, and the Termination Act and Plan, and narrowly construed a portion of the Termination Plan to abrogate the rights to control alienation of tribal lands which the trial court found that the petitioners had explicitly reserved to themselves in Article XII of the MEI Charter.

The Wisconsin Supreme Court recognized that the controversy as to land sales revolved around this language in Article XII:

> ARTICLE XII—SALE OF LAND
>
> Unless otherwise authorized by the affirmative vote of the *holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon*, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation: . . . (Emphasis supplied)

and that "Art. XII which along with the voting trust formed the very heart of the Termination Act itself . . ."[20] However, without citing any support for its position, that Court held the language of Article XII inoperative during the life of the voting trust,[21] thus wiping out in one sentence the rights which Petitioners had thought they had assured themselves when they approved the language of Article XII. The Wisconsin Supreme Court then redefined the land sales issue as: "whether the voting trust agreement clearly grants authority to the trustees to sell land to non-Menominees."[22] Relying exclusively on the language of the voting trust agreement which did not mention land sales in any context, it held that the general language therein giving the trustees the power to vote the stock they held for every purpose, was a clear and specific grant of authority to the trustees to sell land to non-Menominees.[23]

The Wisconsin Supreme Court, thus, considered only a small part of the Menominee Termination Plan, which did not address the issue of land sales, and held the portion which did inoperative, without citing any support, in concluding that a seven member voting trust had the power to sell any amount of tribal lands to non-Menominees. Although the Wisconsin Supreme Court had before it the trial court's and petitioner's characterization of the case as a unique one involving Indian lands, and hence, in view

[20] Appendix A, p. 23, post.

[21] Appendix A, p. 27, post.

[22] Appendix A, p. 25, post.

[23] Appendix A, pp. 25-26, post.

of the language of Article XII, it was necessary to look to all the pertinent documents and circumstances surrounding the tribe's approval of the Plan in order to ascertain the intent of the tribe on this question, that Court refused to consider the intent of the tribe when it approved the language of Article XII concerning sale of tribal lands.

4. The Wisconsin Supreme Court's method of review flies in the face of this Court's consistent standards of reviewing dealings of the government with the Indians.

The Court of Claims in *Menominee Tribe of Indians* v. *U.S.*,[24] in holding that Menominee hunting and fishing treaty rights survived Termination, noted that the Wisconsin Supreme Court had based its previous decision in that case "solely on its interpretation of the words and language of the Act itself," and that had the Wisconsin Supreme Court:

> had the benefit of all the facts and circumstances surrounding the contemporaneous consideration of Public Law 280, . . . including the plan of the tribe incorporating a portion of Public Law 280 therein, and its approval by the Secretary of the Interior, in effect making such provisions of Public Law 280 a part of the Termination Act, the decision of that court might well have been different.

In the instant case, the Wisconsin Supreme Court *did* have, by virtue of the trial court's opinion and petitioners' arguments, the benefit of all the facts and circumstances surrounding the adoption of a Termination Plan which led

---

[24] 179 Ct. Cl. 496, 510 (1967), 394 U.S. 404 (1968).

the trial court to hold that the tribal members had unquestionably reserved the right to themselves to approve sales of tribal land to non-Menominee.

Yet it still chose to rely exclusively on one small portion of the Plan in reaching its decision.

The fact that 25 U.S.C. §896 required the Secretary to approve the Plan and that such approval was necessary in order to effectuate the Act, makes the provisions of the plan a part of the Termination Act. [25]

In examining the Government's dealings with the Indians, this Court has consistently and without exception applied a liberal rule of construction under which doubtful expressions are to be resolved in favor of the Indians. See *Choate* v. *Trapp*, 224 U.S. 665, 675; *U.S.* v. *Shoshone Tribe*, 304 U.S. 111, 117; *Choctaw Nation* v. *U.S.*, 318 U.S. 423, 432; and *Winters* v. *U.S.*, 207 U.S. 564, 576. Such dealings have also been continuously construed by this Court in light of the historical circumstances under which they were executed and approved, with paramount emphasis being placed upon what was intended, understood and consented to by the Indians. See *Mattz* v. *Arnett*, ... U.S. ....., 37 L. Ed. 2d 92, 101; *Squire* v. *Capoeman*, 351 U.S. 1, 9; *Tulee* v. *State of Washington*, 315 U.S. 681, 684; *Carpenter* v. *Shaw*, 280 U.S. 363, 367; *Marlin* v. *Lewallen*, 276 U.S. 58, 64-65; *U.S.* v. *Payne*, 264 U.S. 446, 448-9; *Winters* v. *U.S.*, 207 U.S. 564, 576-577; and *Cherokee Intermarriage Cases*, 203 U.S. 76, 94-95. Reference to tribal meeting minutes to ascertain tribal intent has also occurred. See *Tulee* v. *State of Washington, supra.*

Further, this Court has often rejected arguments in such cases which were based on literal or technical interpreta-

[25] See quotation from Court of Claims, supra.

tions of pertinent documents, see *Marlin* v. *Lewallen, supra,* p. 65; *U.S.* v. *Payne, supra,* p. 449; *Winters* v. *U.S. supra,* p. 577, and *Cherokee Intermarriage Cases, supra,* p. 95.

The language in *Winters* v. *U.S., supra,* is particularly appropriate here. In deciding whether the Indians there had given up certain water rights, this Court stated that the liberal rule of construction:

> Should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the "double sense" which might sometimes be urged against them. [267 U.S. 564, 577].

In the present setting, these canons of construction require a determination that the tribal members expressly reserved to themselves in the language of Article XII of MEI's Charter the right to approve land sales to non-Menominees. The Wisconsin Supreme Court's refusal to look at the intent of the tribe at the time it approved the Plan has resulted in a decision based upon a technical, legalistic construction of but a small portion of the Termination Plan which did not mention land sales, to the exclusion of a portion of the Plan specifically relating to such sales. For the above reasons, the Wisconsin Supreme Court's decision in regard to sales of tribal lands is totally unacceptable and must be reversed else the petitioners continuing treaty rights and the Congressional intent behind 25 U.S.C. §896 are unlawfully denied.

5. The Secretary of the Interior's approval and promulgation of the Menominee Termination Plan should be construed to have incorporated tribal and congressional intent respecting the restrictions on the alienation of tribal lands.

When the Secretary of the Interior published the approved Menominee Termination Plan, he was subject to unique limitations upon his administrative discretion existing in the field of Indian affairs:

> . . . the principles applicable to an "ordinary fiduciary" add little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee. In *Seminole Nation* v. *U.S.*, 316 U.S. 286, Mr. Justice Murphy, speaking for the Supreme Court said * * * this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. *Menominee Tribe of Indians*, 101 Ct. Cl. 10, 19 (1944).

Moreover, the Secretary was under a special statutory mandate, 25 U.S.C. §896, to assist the tribe in formulating a termination plan which conformed to applicable federal law. But the Wisconsin Supreme Court, by refusing to view the Termination Plan as a cohesive document and in light of the circumstances surrounding its approval by the tribe and the Secretary, has not only ignored Menominee treaty and statutory rights, and the expressed understanding of the Menominee people; but has also imposed a state law construction on the Menominee Termination Plan which raises serious questions as to the legality of the Secretary's role in approving the Plan.

B. THE WISCONSIN SUPREME COURT'S HOLDINGS ON THE TRANSFER OF TRIBAL MEMBERS BENEFICIAL OWNERSHIP INTERESTS TO THE VOTING TRUSTEES AS PROVIDED FOR IN § 893, CONSTITUTES A DENIAL OF THE RIGHTS WHICH WERE GUARANTEED TO PETITIONERS BY THAT SECTION OF THE TERMINATION ACT.

Section 893, 25 U.S.C., of the Menominee Termination Act stated that upon the Secretary's Proclamation of Final Closure of the roll of the tribe,

> "the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe . . . Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe." [Appendix E, post]

The Secretary's proclamation was published December 12, 1957 at pp. 9951-9972 of the Federal Register. The language of Section 893 on its face constitutes a unique arrangement concerning the beneficial ownership rights of individual tribal members in the tribal assets. The in-common ownership rights which each tribal member held before the Secretary's Proclamation, became divisible personal property rights upon that Proclamation in 1957, and yet the tribe still retained the right to issue the Certificate of Beneficial Interest which manifested those rights, and also to adopt regulations controlling the alienation of the rights. Thus, both the individual tribal members and the tribe derived certain rights to the beneficial ownership interests in the tribal assets under §893.

It is petitioners' position that the Wisconsin Supreme Court's holding that the tribe's approval of the concept of a voting trust was adequate to convey all the shares that the tribal members were entitled to receive by virtue of the language of §893, 25 U.S.C., is a clear violation of the personal property rights bestowed upon the petitioners by the language of 25 U.S.C. §893. Further, the Wisconsin Supreme Court's holding that the issuance of the Certificate of Beneficial Interest by the chairman of the advisory council and its transfer to the C & N Committee was valid in that the tribe adopted the Plan calling for the transfer of tribal assets to the tribal corporation and voting trust, ignores the fact that the Certificate of Beneficial Interest which manifested these interests, was not included in the Plan which was approved by the Tribe.[26] Therefore, any language contained in the Certificate purporting to give authority to the chairman of the advisory council or the C & N Committee to issue and alienate the rights evidenced in the Certificate is invalid. The Wisconsin Supreme Court's reliance on the fact that the chairman of the advisory council, who issued the Certificate, was the highest elected official of the tribe is contrary to its own recognition that the advisory council could only handle day-to-day matters.[27] The issuance of the Certificate evidencing all the beneficial ownership interests in tribal assets is hardly a routine matter. Finally, the C & N Committee was only given the authority by the general council to formulate a

---

[26] See Record, pages 633-4.

[27] Appendix, A, p. 2, post

Termination Plan,[28] not to alienate the beneficial ownership interests of the tribal members to a voting trust.

What is at stake in this issue is control of the tribal assets after termination. The Wisconsin Supreme Court refused to consider the minutes of the general council meetings during which the Plan and the role of the voting trustees were discussed. That Court's reliance on the Secretary's approval of a "reasonable" Plan to establish the Plan's validity, cannot justify its refusal to examine tribal intent at the time the tribe approved the Plan, nor its blatant disregard of the discrepancy between the facts as stated in its opinion and the fact that the procedure which was followed in alienating the beneficial interests to the voting trust did not meet the clear language of 25 U.S.C. §893. And, again, in view of the Wisconsin Supreme Court's decision, serious questions are raised as to the exercise by the Secretary of his general trusteeship duties to the tribe and the special duty he had under 25 U.S.C. §896 to approve a Plan only if it conformed to federal law.

C. EFFECT OF THE WISCONSIN SUPREME COURT'S DECISION ON THE MENOMINEE AND OTHER TRIBES.

If the narrow, technical standard of review which was utilized by the Wisconsin Supreme Court in the instant case is allowed to stand unchanged, other state courts might be encouraged to abrogate or deny Indian rights secured by federal legislative or administrative actions when questions as to their construction are raised in state courts. This case concerns two of the most basic issues which concern Indian tribes; sale of tribal lands and control of tribal

[28] Appendix A. p. 3, post.

assets. In the instant case, the sale of over 2,000 lots to non-Menominee purchasers has already resulted in the destruction of valuable hunting and fishing grounds by flooding and subdivision, (see the petition in the companion case, *Daly* v. *DNR*), and a present and potential influx of thousands of permanent non-Indian residents who represent an extremely serious threat to the survival of Menominee culture and continued local political control by the approximately 2,500 Menominee residents of Menominee County, Wisconsin. There is no question but that irreparable harm has been caused by the sale of Menominee lands since 1961, but past sales are no excuse to allow more unlawful sales to be made.

This Court has often granted certiorari in cases where state courts had interpreted and applied federal law involving Indian tribes in conflict with applicable decisions of this Court. See *Mattz* v. *Arnett*, ... U.S. ....., 37 L. Ed. 2d 92, 95; *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 368, 368; *Seymour* v. *Superintendent*, 368 U.S. 351, 353-4; and *Williams* v. *Lee*, 358 U.S. 217, 218. And in *Affiliated Ute Citizens* v. *U.S.*, this Court granted certiorari "because of the importance of the issues for Indians whose federal supervision is in the course of termination." 406 U.S. 128, 141. In the recent *Mattz* and *Affiliated Ute Citizens* cases, supra, this Court recognized that the congressional philosophy and purpose, as well as the historical background of legislation affecting the Indians in those cases was to be considered in resolving the issues raised there. See *Mattz* at 37 L. Ed. 2d 92, 101 and *AUC* at 406 U.S. 128, 151. Petitioners here submit that the Wisconsin Supreme Court's failure to so consider the important claims which this case presents, has irreparably damaged the Menominee tribal assets and culture and, therefore, cannot be allowed to stand.

CONCLUSION

Petitioners respectfully request the Court to grant certiorari in that this case presents important federal issues relating to all Indian tribes and the Menominee tribe in particular, which have never been decided by this Court. Petitioners also believe that the Wisconsin Supreme Court has clearly decided the issues in a way which violates the Menominee Indian Tribe's rights under federal treaty and statutes, and contrary to the manner in which the issues similar to those raised here are decided by federal courts and this Court.

Respectfully submitted,

JOSEPH F. PRELOZNIK
MARY VAN GEMERT
Counsel for Petitioners

APPENDIX

APPENDIX

APPENDIX A

SUPREME COURT OF WISCONSIN

Tomow and others, Plaintiffs and Respondents v. N. E. Isaacson & Associates, Inc., Defendant and Appellant: Menominee Enterprises, Inc., and others, Defendants and Respondents.

No. 508. Argued June 4, 1973.—Decided June 29, 1973.

Appeal from parts of a judgment of the circuit court for Menominee county: William J. Duffy, Circuit Judge of the Fourteenth Circuit. Presiding. *Affirmed in part; reversed in part.*

Action by Henry L. Tomow, Sr., and 161 other members of the Menominee Indian Tribe who are or were at all times material, registered shareholders and/or holders of voting trust certificates of Menominee Enterprises, Inc. (hereinafter "plaintiffs"), on behalf of themselves and all other shareholders simialrly situated; against Menominee Enterprises, Inc. (hereinafter "MEI"); the officers and directors of "MEI"; the trustees of the Menominee common stock and voting trust (hereinafter "voting trust"); and N. E. Isaacson & Associates, Inc. (hereinafter "Isaacson") who, together with "MEI," entered into a partnership known as "Lake of the Menominees," (hereinafter "LOM") challenging the validity of the "voting trust," the power of the trustees of the "voting trust" to authorize the sale of land to non-Menominees and the validity of certain land transfers made to "LOM."

The facts upon which the present action is based are, for the most part, without dispute and the result of a stipulation between the parties.

The Menominee Indian Tribe was well established in Wisconsin two hundred years before the European settlers began their westward movement across the United States. Except for a small cession of land for the Stockbridge-Munsee Reservation, the last of a series of treaties between the United States government and the Menominee Tribe was the "Treaty of Wolf River" of 1854. Pursuant to the treaty, the Menominees ceded land to the United States and the United States agreed to give to the Indians land of which the present Menominee county was the largest part.

Traditionally, all tribal affairs were handled by the tribe in general councils and by the advisory council. The general councils were meetings open to the entire tribe at which all adult enrolled Menominees could vote. The advisory council, created in 1928, was an elected body that concerned itself primarily with business management of day-to-day affairs. Its action could be overturned by a vote of a general council or by the secretary of the interior.

In 1953, Congress, by concurrent resolution, instructed the secretary of the interior to recommend legislation for the withdrawal of federal supervision over the Menominees as well as several other named tribes and in 1954, Congress passed the "Termination Act."[1] After publication of the secretary of interior's proclamation in the Federal Register,[2] termination became effective midnight,

---

[1] 68 U.S. Stat. at L., p. 250, as amended, 70 U.S. Stat. at L., p. 549, 72 U.S. Stat. at L., p. 290, 74 U.S. Stat. at L., p. 867; 25 USC, secs. 891-902.

[2] 26 Fed. Reg., No. 82, April 29, 1961, at page 3726.

April 30, 1961. The proclamation provided for the transfer of the tribe's property which was held in trust by the federal government and the end of any supervision and control by it over the Menominees and the Menominee Reservation.

In November, 1957, a general council of the tribe created the "Menominee Co-ordinating and Negotiating Committee" (hereinafter "C. N. Committee"). The function of the four-member committee was to develop a termination plan such as was called for by the "Termination Act" itself.[3] Authority for the preparation of the termination plan came from the general council which created it under the advisory council.

In December of 1957, the final rolls of membership in the Menominee Tribe were closed and the membership list of 3,270 persons was published in the Federal Register. A "Termination Plan" was proposed to a general council in a series of three meetings in January of 1959 and as amended by those present, it was approved by a 91 to 16 vote on January 17, 1959. It was also approved by the secretary of the interior.

Part of the plan called for the creation of the "Menominee common stock and voting trust." Individual members of the Menominee Tribe did not enter into written agreements creating the voting trust and consequently, whatever legal assent which exists on the part of the Menominees to the establishment of the voting trust emanates from the votes of the general council. At all times material to this action, there were seven trustees of the voting trust: four enrolled members of the Menominee Tribe elected by the general council and three nontribal members elected joint-

[3] 25 USC, 896.

ly by the advisory council and C. N. Committee, subject to confirmation by the general council. The affirmative vote of five trustees is needed to take any action. Under the provisions of the "Termination Plan" the selection of the trustees occurred in advance of the termination date and before any trust in fact existed. While the voting trust is in existence, it may be terminated by the tribal members who become holders of the voting trust certificates in ten, twenty or thirty years. Under the original plan, the certificates could not be sold or negotiated before January 1, 1971, with "MEI" having the option to purchase the certificates at the proposed sales price, and, in the absence of the exercise of the option, the state of Wisconsin has the same right. In May of 1969, the certificate holders were given the opportunity to extend the January, 1971, deadline until January 1, 1974, and approximately 51.2 percent of the certificate holders voted for the extension.

Contemporaneously, with the selection of the initial trustees, the plan also called for the creation of a corporation under Wisconsin law to be known as Menominee Enterprises, Inc. ("MEI") The members of the C. N. Committe, as individuals, signed as incorporators of "MEI." Under the provisions of the plan, the voting trustees, prior to the organization meeting of the corporation, will informally name the individual directors of "MEI" and those persons will be named in the articles of incorporation and will formally be elected by the subscribers of all of the stock—the C. N. Committee—at the organization meeting.

The principal purpose of "MEI" is to manage and operate all of the business and property, real and personal, transferred to the corporation by the United States of America, pursuant to 25 USC, 897. Although "MEI" owns

and operates a sawmill and smaller, related businesses, its principal asset is land. By two deeds, both dated April 26, 1961, and recorded in the office of the register of deeds of Menominee county, Wisconsin, the United States conveyed to "MEI" all of the land which, for practical purposes, previously constituted the Menominee Indian Reservation and which presently constitutes Menominee county, Wisconsin. About one quarter of a million acres comprise Menominee county.

Under the articles of incorporation, "MEI" was granted the authority to issue shares of stock and the "MEI" directors accepted the subscription of the committee. The Secretary of the Interior then advanced $327,000 of the funds he was holding in trust and this money was used to pay for the stock. "MEI" issued a single stock certificate to the committee for 327,000 shares of stock. The C. N. Committee signed the voting trust agreement and named as trustees those individuals previously approved by a general council and transferred the stock "MEI" held in its name to the voting trust. The trustees then issued voting trust certificates to the enrolled Menominess as evidence of their interests in the stock the trustees held, with each certificate representing 100 shares of stock in "MEI." In the case of minors and incompetents, the certificates were turned over to the "Menominee assistance trust," a second trust provided by the plan with the First Wisconsin Trust Company acting as trustee.[4] It was stipulated that each

[4] The plan also provided that upon termination, $1,500 was to be distributed to each enrolled Menominee. After the other assets were transferred to "MEI", it issued a $3,000 income bond to each individual Menominee. The bond is payable on December 1, 2000, and pays 4 percent interest or $120 per year.

step required to be taken under the "Termination Plan" for the organization and activation of "MEI" and the voting trust were in fact taken.

On August 10, 1967, the board of directors of "MEI" and the trustees of the voting trust jointly passed a resolution. Eight of nine directors and all of the then seven trustees unanimously adopted the following resolution:

"WHEREAS, there is no other means sufficiently capable of accomplishing the economic improvement of the Menominee community except by adoption and implementation of the ERNST & ERNST REPORT; and

"WHEREAS, to provide necessary tax resources for Menominee County and/or the Town of Menominee and for the relief of taxation on Menominee Enterprises, Inc. (and the residents of Menominee County, Wisconsin), and to assure continued Menominee ownership thereof:

"I. BE IT RESOLVED, that Menominee Enterprises, Inc. is authorized to proceed with the recommendations of the Ernst & Ernst Report as opportunity and feasibility permit; and

"II. RESOLVED FURTHER, that the Corporation is authorized to *define economic development zones on its land in Menominee County,* Wisconsin, not to exceed 8,750 acres in areas to be defined and described from time to time by the Menominee Common Stock & Voting Trust, and/or the shareholders of the Corporation, whichever then holds the common stock; and

"III. RESOLVED FURTHER, that *pursuant to Article XII of the Articles of Incorporation of Menominee Enterprises, Inc.* within such economic development zones *warranty deeds may issue as a form of land transfer, pro-*

vided a sufficient form of quality control is a condition of such transfer, and provided always that sufficient areas of land on lakeshore be reserved for Menominee use." (Emphasis added.)

The "Ernst & Ernst Report"[5] referred to in the resolution was a technical assistance study of Menominee county by the Economic Development Administration which recommended that in order for the county to achieve economic self-sufficiency, the county's recreational resources be developed by the creation of several large lakes from smaller ones and the development of the cottage sites around them. The "Termination Plan" itself had stated only that the area had excellent commercial recreational possibilities, the development of which was being considered.

Art. XII of the articles of incorporation of "MEI" referred to in the resolution contains the following provision governing the sale of land by the corporation:

> *"Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation; . . .* provided, further, that the board of directors, or the appropriate officers at the direction of the board of directors, shall have authority to sell or to convey to individuals, who were enrolled tribal members under section 893, Title 25, U.S.C. (final roll) or their heirs-at-law, individual parcels which in the aggregate will not exceed 14,500 acres for home sites, agricultural use, or other development, . . ." (Emphasis added.)

---

[5] Ernst & Ernst, *Technical Assistance Study of the Potential for Tourism and Industrial Development in Menominee County, Wisconsin,* C-164-66 (NEG) Economic Development Administration, U.S. Department of Commerce, March, 1967.

On September 13, 1967, a referendum was held in which all Menominees who held certificates (except minors and incompetents whose interests were voted by their special trustee, First Wisconsin Trust Company) were invited to express their opinion on the resolution of August 10, 1967. Of a total of 109,125 votes cast, 97,738 were for and 11,387 were against the resolution. Among the "yes" votes were 79,362 votes cast by First Wisconsin Trust Company. The referendum was announced as "advisory" and the written material distributed referred to the use of warranty deeds.

On July 9, 1968, "MEI" and N. E. Isaacson entered into an agreement whereby they established a joint venture to be known as "Lake of the Menominees" ("LOM") which was, however, to be governed by the Wisconsin Uniform Partnership Act. By the terms of the agreement of July 9, 1968, the partnership was entered into for the purpose of holding, developing and selling to persons including non-Menominees certain lands consisting of 5,170 acres located within the economic development zone referred to in the joint resolution of August 10, 1967.

The agreement of July 9, 1968, was contingent upon approval by the trustees which was given unanimously by them in July of 1968. "LOM" undertook a substantial and extensive land and lake development project known as "Legend Lake" and among other things, approximately 2,000 recreational homesites out of 2,600 such sites have been sold and water-level control dams and roads have been constructed. Subsequently, between the dates of September 12, 1968, and April 5, 1971, the approximately 5,170 acres referred to in the partnership agreement of July 9, 1968, were conveyed by "MEI" to "LOM" partnership by means of seven warranty deeds, all of which were executed

and recorded in the office of the register of deeds of Menominee county, Wisconsin prior to the commencement of the present action. Of the 5,170 acres conveyed, 1,333 acres valued at $150 per acre, represented "MEI's" initial contribution to the "LOM" joint venture. By the agreement, "MEI" gave to "LOM" the option to purchase an additional 3,837 acres also at $150 per acre.

On September 30, 1968, "MEI" and Isaacson by written agreement decided that Isaacson was to be the "managing partner" of "LOM" and to facilitate the management, development and sales of land that N. E. Isaacson, as president of Isaacson, and Ralph Voss, as vice president and assistant secretary, would have power of attorney to execute all deeds of conveyance from "LOM" to any purchaser in the ordinary course of business.

The agreement of July 9th was performed to a substantial degree and in 1969, Isaacson and "MEI" agreed to increase the number of lots to be developed and sold from 1,800 to 2,600, all of them to be laid out on the land conveyed by the seven warranty deeds. On or about March 11, 1969, "LOM" applied for a permit to construct a third dam in the Legend Lake Project. On October 15, 1971, Isaacson asked "MEI" if it would agree to try to sell out the project in 1972 and to incur additional selling costs beyond the agreement ceiling of 30 percent. A motion (of the "MEI" Board) was passed to refer the matter to "LOM" Management Committee to act within its discretion.

The present action was filed in the circuit court for Menominee county, Wisconsin on October 25, 1971, and a lis pendens containing the names of the parties, the object of the action, and a description of the land involved in the

action was filed with the office of the register of deeds in Menominee county on the same day. The first count of plaintiffs' complaint alleges that neither they nor any other "MEI" shareholder ever entered into a written voting trust agreement creating a voting trust for the purpose of conferring upon defendant trustees or any other trustees the right to vote or otherwise represent their shares in "MEI." It goes on to allege that the defendant trustees of the voting trust are and have been unlawfully exercising the voting rights of plaintiffs and other shareholders in that they have elected the defendant directors of "MEI" and excepting trustees Ignace and Deer, they have participated in, approved and/or ratified a decision of the defendant directors to sell "MEI" land to nonenrolled Menominee tribal members in violation of the articles of incorporation and in usurpation of plaintiff's rights. Likewise, they contend that pursuant to the trustees' approval, the officers and directors of "MEI" entered into an agreement with defendant Isaacson purporting to bind "MEI" to a joint venture involving the sale of land to non-Indians.

Plaintiffs' complaint as a second count, alleges that with the exception of certain limited sales of real property to enrolled tribal members, "MEI's" articles of incorporation specifically bars the sale of corporation real property unless it is authorized by the affirmative vote of the holders of not less than two thirds of the outstanding shares of stock entitled to vote thereon, and in spite of the fact that no sale of "MEI" real property has ever been authorized by the holders of not less than two thirds of the outstanding shares of stock entitled to vote thereon, the officers and directors of "MEI" have purported to sell corporate real property through the "LOM" joint venture.

Pursuant to their first count, relating to the validity of the "Voting Trust," plaintiffs demanded judgment declaring the "voting trust" null and void; an order permanently enjoining the "MEI" directors from attempting to exercise in any way the rights of the plaintiffs, a determination that the joint venture agreement of July 9, 1968, between Isaacson and "MEI", except as to the rights of prior good faith purchasers, is null and void; that the declaration in the July 9th agreement given to N. E. Isaacson and Ralph Voss power of attorney to execute all deeds of conveyance from "LOM" to any purchaser is null and void; an order calling for the election of a new board of directors; and an order requiring defendants "MEI" and Isaacson to recovery to "MEI" all properties formally transferred to "LOM" which had not been conveyed to a good faith purchaser at the time the defendants learned of the lawsuit, or at the time of filing the action, whichever is earlier.

As judgment on the second count of their complaint, plaintiffs demanded that a special shareholders meeting be called for the purpose of electing new directors of "MEI"; that the "LOM" agreement be declared null and void; that the officers and directors of "MEI" be enjoined and restrained from honoring its contract with Isaacson in any way whatsoever; an order requiring the officers and directors of "MEI" to make an accounting and to pay into court all money and assets accounted for; and other relief concerning the liability of the officers and directors to "MEI" for all losses and damages occasioned by their acts.

On April 21, 1972, the plaintiffs, by stipulation and with court approval, filed a supplemental complaint which added certain defendants because of their election as trus-

tees of the "voting trust" or directors of "MEI." The supplemental complaint also alleged that the joint venture agreement dissolved December 31, 1971, unless extended; that Isaacson and "MEI" did not extend it; that another agreement for the sale of land to non-Menominees would require authorization by the holders of at least two thirds of the outstanding shares entitled to vote or that is to say, enrolled Menominees.

They also allege that since termination of the agreement, neither two thirds of the enrolled Menominees nor two thirds of the trustees have authorized new sales to non-menominees and that at the present time, "LOM" could not obtain a two-thirds vote of authorization from the trustees, as evidenced by the affidavits by six of the eleven trustees, stating that they were opposed to land sales to non-Menominees and would vote against such sales were a vote taken; and that in spite of this, "MEI" and Isaacson are and threaten to continue to sell land to non-Menominees.

The action came to trial before the court, without a jury, on May 8, 1972. In its written decision of July 24, 1972, the trial court found that although the "voting trust" was not invalid, art. XII of the articles of incorporation of "MEI" relating to the sale of land by the corporation was ambiguous and consequently heard extrinsic evidence concerning the basic intent of the parties in the adoption of art. XII. After a review of the evidence upon which it relied, the court concluded that the reference to "two thirds of the outstanding shares of stock entitled to vote thereon . . ." referred to two thirds of the enrolled Menominees and not to a two-thirds vote of the trustees. The court then granted an injunction against any further sales of land with the

understanding that jurisdiction would be retained to consider evidence in support of other remedies at a later date.

Subsequent to the July 24th decision, the defendants, by orders to show cause, brought motions seeking to clarify and limit the earlier injunction. The parties agreed at the time of the hearing on these motions that there were 121 sales of lots, estimated at approximately $900,000 in which offers of purchase had been accepted, but the delivery of deeds and formal closing had not yet occurred. In six of these sales, the offer and acceptance had occurred prior to October 24, 1971, the date of filing of the lis pendens.

Isaacson contended that the conveyance of the seven warranty deeds were executed conveyances, and even though made in an irregular manner under the court's earlier ruling, they should not be impeached or disturbed because of any irregularity in the exercise of the unquestioned corporate power. Although it recognized the rule of law relied on, the circuit court, nevertheless, concluded that the transfer of 5,170 acres of land by seven deeds by "MEI" to "LOM," all occurring prior to the filing of the lis pendens, were not entitled to the status of completed or executed transactions.

From those parts of the court's interlocutory judgment that held "Article XII of MEI's" articles of incorporation ambiguous; that held the seven conveyances from "MEI" to "LOM" prior to the commencement of the action to be without necessary stockholder approval and, therefore, an improper exercise of the corporation's power to convey land; that held sales made subsequent to the commencement of the action were subject to the continuing jurisdiction of the court because the seven conveyances from "MEI" to "LOM" were not executed corporate transactions; and which enjoined the defendants from any

further sales of land to non-Menominees, Isaacson and the other named defendants have appealed. Defendant "MEI", however, is not participating in this appeal.

From that part of the interlocutory judgment holding the "voting trust" valid under Wisconsin law, the plaintiffs have appealed.

For the appellant there were briefs by *Welsh, Trowbridge, Planert & Schaefer* of Green Bay, and oral argument by *Vance M. Waggoner,* of Green Bay.

For the plaintiffs-respondents there was a brief by *Joseph F. Preloznik* and *Mary E. Van Gemert,* both of Madison, and oral argument by *Mr. Preloznik.*

For the defendants-respondents there were briefs by *Foley & Lardner* of Milwaukee, and oral argument by *Gilbert W. Church* of Milwaukee.

HANLEY, J. Three issues are presented on this appeal.

1. Did the trial court err in holding that the Menominee common stock and voting trust was not invalid because it was contrary to controlling federal and state law and the United States Constitution;

2. Did the trial court err in holding that art. XII of the articles of incorporation of "MEI" was ambiguous and, therefore, a proper matter for judicial construction; and

3. Did the trial court err in holding that the unsold land which was conveyed by "MEI" to "LOM" without the approval of the individual tribal members was subject to plaintiffs' lis pendens and an injunction prohibiting its sale?

Validity of voting trust.

The "Termination Act" which mandated the complete withdrawal of federal supervision and control over the

Menominee Tribe called for the formulation of a plan for the future control of tribal property and service functions by the tribe itself. 25 USC, 896 of the federal statute provided that the plan, when completed, was to be submitted to the secretary of the interior who ". . . *shall accept such tribal plan* as the basis for the conveyance of the tribal property *if he finds that* it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to Section 893 of this title, and that it conforms to applicable Federal and State law." (Emphasis added.)

Contrary to the contentions of the plaintiffs who are as to this issue appellants on appeal, both the secretary of the interior and the trial court were satisfied that the mandate of 25 USC, 896 was complied with. After a review of the various arguments which the plaintiffs have raised, this court reaches the same conclusion.

The plaintiffs' first contention in support of their conclusion that the voting trust here involved is invalid is that Wisconsin's voting trust statute, sec. 180.27, Stats., was not complied with. Sec. 180.27, was originally enacted by sec. 7 of ch. 731, Laws of 1951, and now provides:

> "*Voting trusts and agreements among shareholders.*
>
> (1) Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing a counterpart of the agreement with the corporation at its registered office and by transferring their shares to such trustee or trustees for the purposes of the agreement. Such trustee or trustees shall keep a record of the holders of voting trust certificates evidencing a beneficial interest in

the voting trust, giving the names and addresses of all such holders and the number and class of the shares in respect of which the voting trust certificates held by each are issued, and shall deposit a copy of such record with the corporation at its registered office. The counterpart of the voting trust agreement and the copy of such record so deposited with the corporation shall be subject to the same right of examination by a shareholder of the corporation, in person or by agent or attorney as are the books and records of the corporation, and shall be subject to examination by any holder of a beneficial interest in the voting trust, either in person or by agent or attorney, at any reasonable time for any proper purpose.

"(2) Agreements among shareholders regarding the voting of their shares shall not be subject to the provisions of this section regarding voting trusts."[7]

Under the above statutes, pursuant to an agreement, shareholders transfer their shares to the voting trustees which transfers are in turn recorded on the corporation's book, thereby making the trustee the record holders. During the period of the trust and pursuant to the trust agreement, the trustees vote the shares. In exchange for the shares, voting trust certificates which represent the equitable interest in the shares transferred, and any shares which might be awarded as dividends are issued by the trustees to the original shareholders.

---

[7] The statute originally limited a voting trust to not more than twenty years; ten years longer than the Model Code. Even the twenty-year limitation was omitted by ch. 399 of the Laws of 1953. Such unlimited duration is not common to the statutes of most other states. *See* Henn, *Law of Corporations* (1970), p. 392, sec. 197. Sub. (2) of sec. 180.27, exempting shareholder agreements from the provisions of the voting trust statute, was created by sec. 15, ch. 285, Laws of 1971.

In material part, sec. 180.27, Stats., provides that "Any number of shareholders of a corporation may create a voting trust . . . by entering into a written voting trust agreement . . ." The thrust of the plaintiffs' argument is that the individual enrolled members and not the C. N. Committee whose members signed as incorporators of "MEI" and who also signed the voting trust agreement were the "shareholders" of the corporation for purposes of entering into the agreement.

Under the articles of incorporation, "MEI" was granted the authority to issue shares of stock and the "MEI" directors accepted the subscription of the C. N. Committee which was originally created by the general council to develop the Termination Plan. The secretary of the interior then advanced $327,000 of the funds he was holding in trust and this money was used to pay for the stock. "MEI" issued a single stock certificate to the committee for 327,000 shares of stock. The C. N. Committee signed the voting trust agreement and named as trustees those individuals previously approved by a general council and transferred the stock "MEI" held in their name to the voting trust. The trustees then issued voting trust certificates to the enrolled Menominees as evidence of their interests in the stock the trustees held, with each certificate representing 100 shares of stock in "MEI."

The defendants contend that the voting trust was formed in exact compliance with sec. 180.27, Stats. Shares in "MEI" were issued to members of the C. N. Committee who then transferred the stock to the trustees on the basis of a written instrument. The shareholders thus created the trust by "entering into a written voting trust

agreement" as required by statute. Likewise, this procedure conformed exactly to the provisions in the Termination Plan which was agreed upon by the Menominees.

Plaintiffs contend that the vote of the general council in January of 1959, which approved the Termination Plan—including the voting trust agreement—could not be a substitute for individual "shareholder" approval. This argument, together with the cases which are cited by the plaintiffs, are all predicated on the proposition that individual Menominees had been issued "shares" of stock in "MEI" prior to the formation of the trust.

While it is clear that 25 USC, 893, referring as it does to the "rights or beneficial interests" of each of the enrolled Menominees, "shall constitute personal property . . . evidenced by a certificate of beneficial interest which shall be issued by the tribe" gave to each enrolled Menominee at the very least an undivided one third 270th interest in the assets of "MEI," such an interest cannot be analogous to a "share of stock." Sec. 896 of Title 25, USC, relating to the Termination Plan which the tribe was to formulate, states that "[t]o the extent necessary, the plan shall provide for such terms of transfer pursuant to Section 897 of this title, by *trust or otherwise,* as shall insure the continued fulfillment of the plan." (Emphasis added.) Sec. 897 provides that "[o]n or before April 20, 1961, the Secretary [of the Interior] is authorized *to transfer to the tribal corporation or to a trustee* of the Secretary's choice . . . *the title to all property, real and personal, held in trust by the United States for the tribe.*" (Emphasis added.)

The two deeds by which the United States conveyed what now constitutes Menominee county were conveyed to "MEI", not to the individual enrolled Menominees.

Likewise, the Secretary of the Interior advanced the $327,000 of the funds held in trust, not to each enrolled Menominee, but rather to the committee who in turn used it to pay for the stock it had previously subscribed to. Prior to termination, individual enrolled Menominees never had certificates or control over their interests in tribal assets. Indeed, the assets were held in trust by the federal government and were subject to tribal and federal law and not corporate law as the plaintiffs contend.

While it is clear that the original draftees of sec. 180.27, Stats., never contemplated a factual situation like the one presented in this case, it likewise is manifestly clear that the procedures here employed did not run counter to the statute. The trial court agreed and stated:

> "I am impressed by the reasonableness of the method established in the plan contrasted with the unwieldy procedure of having the shares issued to the individual Menominees some of whom would be minors or incompetents and then placed in trust under procedural requirements of sections 180.27. It is obvious that a trust arrangement was considered in the best interests of the Menominees in accordance with their own plan. It seems to me the procedure adopted to accomplish this was eminently sensible."

Plaintiffs next contend that the certificate of beneficial interest representing tribal members' rights or beneficial interests in tribal property was issued, transferred and cancelled in violation of 25 USC, 893. Sec. 893 of Title 25, USC, after setting forth a very precise procedure for determining who will be considered an enrolled Menominee with the initial decisions by the tribe, followed by an appeal right to the Secretary of the Interior, provides:

> "When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe."

The certificate itself was executed on June 17, 1964, by James G. Frechette, Chairman, Menominee Advisory Council, and begins as follows:

> "This is to certify that the persons whose names are listed in the schedule attached hereto, identified as 'Final Roll-Menominee Tribe of Indians of Wisconsin' (Vol. 22, FEDERAL REGISTER Number 240, pages 9951-9972, inclusive) are the holders (hereinafter sometimes called 'Tribal Members') of undivided equal shares in this Certificate of Beneficial Interest, which evidences the rights and interests of each such person and all of them and the personal representatives, heirs or next of kin of deceased Tribal Members (hereinafter sometimes called 'lawful distributees') to all property, real and personal, now or hereafter, legally or beneficially owned by the Menominee Indian Tribe of Wisconsin. This Certificate has been issued by said Tribe as of June 17, 1954, pursuant to the provisions of section 391, Title 25 U. S. C. and is the Certificate of Beneficial Interest therein described."

It goes on to provide that it is delivered to the C. N. Committee who shall hold it on behalf of the tribal members of their lawful distributees, "According to the terms

of the certificate." Thereafter, the C. N. Committee "on behalf of the tribal members will cancel the certificate in accord with the terms and provisions of the 'Plan. . .'" The provisions of the plan relating to the certificate provide that:

> "*Description of economic plan.* The economic plan, designed to promote the highest beneficial use of the communal property, is set forth in six basic documents: (1) Articles of Incorporation of Menominee Enterprises, Inc., (2) By-Laws of Menominee Enterprises, Inc., (3) a common stock and voting trust, (4) a bond indenture, (5) a Menominee Assistant trust, (6) a Certificate of Beneficial Interest.
>
> "One Certificate of Beneficial Interest in form attached will be issued pursuant to section 893 Title 25 U. S. C., with list attached thereto of the tribal roll of 3,270 members as of June 17, 1954 (as finally proclaimed.) The Certificate will be issued as of June 17, 1954, in advance of termination date, and will be held by the Coordinating and Negotiating Committee until that date. At that time, the Committee will mark it 'cancelled' and file it with its records.
>
> "It is a part of this Plan that (1) the issue of stock to the said Coordinating and Negotiating Committee, (2) the issue of voting trust certificates to tribal members and lawful distributees of deceased members upon deposit of the stock in the Common Stock and Voting Trust, (3) the issue of income bonds, (4) the transfer of real and personal property to the said Coordinating and Negotiating Committee and/or to Menominee Enterprise, Inc., or any subsidiary, (5) the transfer of real and personal property to any public body; shall all be in substitution for and consideration of cancellation of the Certificate of Beneficial Interest and no one shall thereafter have any rights or interest in such Certificate."

The plaintiffs contend that the chairman of the advisory council had no authority to issue the certificate since by express terms of 25 USC, 893 only the "tribe" could issue the certificate. Likewise, they contend that the chairman had no authority to authorize the C. N. Committee to cancel the certificate in accordance with the terms and provision of the Termination Plan. Assuming the chairman did have authority to issue the certificate, the plaintiffs contend the C. N. Committee did not have authority to cancel the certificate in exchange for "MEI" stock.

First of all, by its very terms, the primary purpose of the certificate of beneficial interest was to put the tribe on record as approving the final roll.

The certificate was signed by the chairman of the advisory council for the tribe because he was the highest elected official of the tribe. Furthermore, the transfer to the C. N. Committee of the certificate and its subsequent cancellation of the certificate were in strict compliance with both the terms of the certificate and with the federal statute. Sec. 893 provided that the interests represented by the certificate could be "alienable" only in accordance with regulations adopted by the tribe. The tribe did adopt the plan calling for the transfer of tribal assets to the tribal corporation and trust. The adoption of the plan "by the tribe" and its use as "the basis for the conveyance of the tribal property" were also authorized by the federal statute. (25 USC, 896, 897)

Plaintiffs' constitutional attack based on both the due process and equal protection clauses are also without merit. As stated before, the individual Menominees were not "shareholders" as that term is used in sec. 180.27,

Stats., and consequently plaintiffs' argument that no other "shareholders" of a Wisconsin corporation could be made to enter into a voting trust without their individual written approval must fail for that reason. Plaintiffs' argument that the procedures here employed deprived them of their personal property without due process of law totally disregards the facts that the Termination Plan was approved by the tribe.

We conclude that the trial court's interlocutory judgment herein, to the extent that it held the Menominee common stock and voting trust to be valid was correct.

Ambiguity of trust.

Defendants contend that the trial court erred in declaring art. XII of the articles of incorporation of "MEI" ambiguous and, therefore, subject to judicial construction by resort to extrinsic evidence. The plaintiffs who, as to this issue, are respondents, support the determination of the trial court. All parties are in agreement that extrinsic evidence bearing on the intent of art. XII may only be resorted to once an instrument has been declared ambiguous in light of circumstances surrounding it at the time of its execution. *In re Fortwin Trust* (1973), 57 Wis. 2d 134, 203 N. W. 2d 711; *Estate of Breese* (1959), 7 Wis. 2d 422, 96 N. W. 2d 712.

Art. XII in material part provides:

> "Unless otherwise authorized by the *affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon,* the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation: . . ." (Emphasis added.)

The *italicized* language in art. XII is the subject of dispute between the parties, as that language relates to "who" is entitled to vote on proposed sales of land to non-Menominees: the trustees of the voting trust or the individual enrolled Menominees. The trial court concluded that it was the intent of the Menominees in enacting art. XII that such power was to be retained by each enrolled Menominee. It first, however, declared art. XII ambiguous.

In regard to art. XII which along with the voting trust formed the very heart of the Termination Act itself, the trial court entered the following conclusions of law which were incorporated into the interlocutory judgment:

> "3. Article XII of the Articles of Incorporation of Menominee Enterprises, Inc., requiring the 'affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote' before the corporation may sell land to non-Menominees *is ambiguous as it relates to the period of time during which the Corporation's stock is held by the Voting Trust.*
>
> "4. The seven conveyances of land made by Menominee Enterprises, Inc. to Lakes of the Menominees, a partnership, prior to the commencement of this action, *were made without the necessary approval required by Article XII of the Articles of Incorporation and were an improper exercise of the Corporation's power to convey land and are, therefore, invalid.*" (Emphasis added.)

Although the written decision of the trial court does make reference to several of the provisions of the voting trust agreement, it is evident that the court in determining that individual Menominees and not trustees

were authorized to approve land sales to non-Menominees, placed principle reliance on art. XII itself. We think the authorities are to the contrary.

> "The powers and duties of the trustees are to be determined from the trust agreement as a whole, not reading one provision to nullify another and thus defeat the trust." 5 Fletcher, *Cyclopedia Corporations* (1967 rev.) ch. 14, p. 433, sec. 2091.1.
>
> "Powers granted to the trustees by the trust instrument are rarely confined to voting at the election of directors; often their authority specifies the power to vote in all respects as could a full owner of shares, including the right to 'consent' to fundamental changes, increase or reduction of capital stock, sale of all assets, and liquidation of the corporation. The grant of power, however, must be explicit since the trustees are denied any power not clearly granted." 1 Hornstein, *Corporation Law and Practice* (1959), p. 298, sec. 212.

The question, therefore, is whether the voting trust agreement clearly grants authority to the trustees to sell land to non-Menominees. This court concludes that it does.

As prescribed by the Termination Plan, the powers of the trustees of the voting trust were spelled out in art. III of the voting trust as follows:

> "III POWERS OF TRUSTEES 1. *The Trustees, in respect of the stock held by them hereunder, are hereby vested as owners of such stock (without limitation except as herein otherwise expressly provided) with all of the rights, powers, and privileges of every kind and character, of owners thereof, including, without limiting the generality of the foregoing (a) the right to vote the same, as hereinafter provided, for every purpose,* (b) the right to become parties to

> or prosecute or intervene in any suits or other legal or administrative proceedings affecting the stock deposited hereunder, the Company, or the powers, duties or obligations of the Trustees, and (c) the right to transfer all or any part of the Company's stock held hereunder into their names as Trustees or into the name "The Trustees of Menominee Common Stock and Voting Trust." (Emphasis added.)

General language at the beginning of art. III gives the trustees "all of the rights" of owners of the stock, subject to certain exceptions not applicable to the present dispute, followed by the very specific language of sub. (a) which grants to them the right to vote the shares "for every purpose."

Although referring to this language contained in art. III, the trial court at no time tried to reconcile it with its conclusion of ambiguity. Art. III certainly is clear enough and broad enough to authorize the sale of land to non-Menominees. Other language in the trust agreement indicates that certificate holders did not have the right to vote on land sales to non-Menominees.

Art. IV requires the approval of two thirds of the certificate holders before the trustees are permitted to sell the stock. The absence of similar provisions requiring the approval of certificate holders for land sales implies that approval of the certificate holders was not required for land sales.

Art. X of the trust specifically provides that:

> "1. The Trustees may construe this agreement, and their construction made in good faith shall be conclusive and binding upon the parties hereto, . . ."

Such a provision has been recognized in Wisconsin as being valid. *Estate of Koos* (1955), 269 Wis. 478, 492, 493, 69 N. W. 2d 598. As reflected in their vote to per-

mit "MEI" to enter into the partnership agreement with Isaacson, the trustees construed the trust agreement when read on the whole to permit such authorization for land sales on their part. Similarly, the trial court's decision stated that "[n]o attack is made by anyone on the good motives of the trustees."

The trial court's conclusion and the plaintiffs' argument on appeal revolves around what all parties recognize to be the basic concept of this and other voting trusts; namely, that the trustees vote the shares which they hold as an undivided unit. Consequently, they argue that the words "holders of two thirds of the outstanding shares" contained in art. XII becomes functionless when applied to the trustees since each has an interest in all of the shares. In order to secure trustee approval under that provision, the board of directors of "MEI" must obtain a unanimous decision from all the trustees, else not one share will have been voted. This, however, will automatically include 100 percent of the shares and thus, it is impossible for the voting trustees to vote two thirds of the outstanding shares on any matter since individual trustees do not hold divisible amounts of stock. There is but one stock certificate representing this common trust and all the trustees hold all the stock. All must agree or not one share can be voted in approval of land sales. It is undisputed that the voting trustees unanimously approved land sales to non-Menominees.

As already pointed out, the holders of the shares during the existence of the voting trust were the voting trustees. While it is true that the language contained in art. XII may have no effect while the trust is still in existence and while the shares are being voted as a unit by the trustees, it will have a clear and unambiguous

meaning after the trust no longer exists; an eventuality which was within the contemplation of all of the parties at the time the plan was adopted.

We conclude that the trial court in holding art. XII of the articles of incorporation ambiguous was in error.

Conveyance of land from "MEI" to "LOM".

In a supplemental decision, occasioned by orders to show cause brought by the defendants, the trial court held that certain lands conveyed to "LOM" by the approval of the trustees and which were subject to the plaintiffs' lis pendens, could be enjoined from further sale in spite of the rule that an executed conveyance, even though made in an irregular manner, will not ordinarily be upset because of the irregularity. The court's ruling was clearly premised on its belief that art. XII was ambiguous and that only enrolled Menominees could authorize the sale of land to non-Menominees.

Since the trial court was in error on its original premises, it was likewise in error to enjoin the sale of land held by "LOM."

By the Court.—That part of the interlocutory judgment which held the voting trust valid is affirmed. Those parts of the judgment which held art. XII of the articles of incorporation ambiguous; which interpreted that only enrolled Menominees could approve land sales to non-Menominees; and which enjoined the future sale of the land held by "LOM" are reversed.

STATE OF WISCONSIN : IN SUPREME COURT

Henry L. Tomow, Sr., et al.,

Plaintiffs-Respondents,

v.

Menominee Enterprises, Inc., et al.,

Defendants-Respondents,

N. E. Isaacson & Associates, Inc.,

Defendant-Appellant,

No. 508

OPINION ON MOTION FOR REHEARING
(Decided August 14, 1973)

PER CURIAM (On motion for rehearing). It is urged that the opinion of the court, in connection with the number of trustees necessary to cast a vote, can be construed to mean that there must be a unanimous agreement of all the trustees of the voting trust to vote the stock they hold. If this construction can be drawn from the opinion, it is withdrawn. As noted in the opinion, the Trust Agreement in the plan provided the trust could act upon the affirmative vote of five of the seven trustees. This provision of the Trust Agreement was subsequently amended to provide an affirmative vote of seven trustees was required. This was done to accommodate this same amendment which increased the number of trustees from seven to eleven. Thus, as the Trust Agreement now provides, seven affirmative votes of the eleven trustees are sufficient to vote the entire stock held by the voting trust to approve the sale of land to non-Menominees.

Motion denied without costs.

APPENDIX B

STATE OF WISCONSIN CIRCUIT COURT

MENOMINEE COUNTY
Case No. 33

HENRY L. TOMOW, SR., et al.,

Plaintiffs,

vs.

MENOMINEE ENTERPRISES, INC., et al.,

Defendants.

DECISIONS ON MOTIONS
(October 26, 1972)

Subsequent to this Court's decision in the above matter on July 24, 1972, two motions were brought on by orders to show cause. These sought to clarify and limit the injunction which was authorized in the decision. I have now had all of the briefs of counsel and will attempt to deal with questions posed by these motions.

It was agreed at the time of the hearing on these motions that there were 121 sales in which offers of purchase had been accepted, but the delivery of deeds and the formal closing had not occurred. In six of these sales the offer and acceptance had occurred prior to October 24, 1971, which was the date of the filing of the lis pendens in this action. A very substantial amount of money estimated by counsel at close to $900,000 is involved in these contracts of sale. Counsel for Isaacson relies on a well-understood principle of law that an executed conveyance even though made in an irregular manner will not ordinarily be impeached or disturbed because of any irregularity in the exercise of an unquestioned power of the corporation. Section 180.04 and 180.06 are

cited as supporting this position. Counsel's position is stated as follows:

> "Clearly, under Section 180.04, Wisconsin Statutes, and under the Articles of Incorporation, Menominee Enterprises, Inc. had the capacity and power, as a corporation, to make conveyances of land to anyone.
> "It has long been the law in Wisconsin that even an ultra vires contract of a corporation will not be impeached or overturned when that contract is fully executed. The above-quoted case state this rule.
> "This rule has also been codified in Section 180.06, Wisconsin Statutes, which permits a court to enjoin only executory ultra vires contracts."

Counsel makes the further point that even though the irregularities in this case may not be strictly speaking ultra vires acts that the same result would occur citing *Blue River Company* v. *Summit County Development Corporation*, 207 F.Supp. 283. The Court in this case quoted Fletcher, Cyclopedia of Corporations, §3402 as follows:

> "'Another class of corporate contracts which are sometimes said to be ultra vires, although the phrase as applied to them is inaccurate, is where the power exists to do what was done, provided the corporation does it in a certain prescribed way. In other words, the irregular exercise of an unquestioned power of the corporation is not ultra vires. Thus, informalities in connection with consent of stockholders to the contract are often incorrectly referred to as ultra vires, using the term in its strict sense. The fact that the required consent of stockholders is not obtained does not make a contract ultra vires.'"

Counsel for the plaintiffs also cited 180.06(1) for the position that the pending sales may be enjoined. This is the section which provides that in a proceedings by a share-

holder the Court may set aside or enjoin the performance of a contract and at the same time allow compensation for certain damages. It would seem the whole question hinges on whether the transfer of 5,170 acres of land by seven warranty deeds by Menominee Enterprises, Inc. to the Lakes of the Menominees, a partnership, has the effect of a completed or executed transaction. These deeds were recorded prior to the lis pendens. I have concluded that they are not entitled to this standing in the law since Menominee Enterprises, Inc. was one of the partners. The deeds were not final acts but part of an overall joint venture for the sale of these lands to persons seeking to purchase them as cottage sites. In other words it is my judgment that from this standpoint the transfer of the land to the partnership in accordance with the agreement for the sale of this land does not substantially alter the result.

I am of the opinion that the test whether or not the matter is a completed transaction or executory has to be applied with respect to the ultimate purchasers and not to the conveyances to the partnership. Counsel also argues that what this Court has done is to reform the written instruments to reflect the intent of the parties rather than interpret the writings. Assuming this is correct and that it may have an effect on the ultimate result, I don't think it would change the application of the lis pendens considerations.

LIS PENDENS

I am of the opinion that the lis pendens which was filed in this matter has the effect of making all subsequent purchasers subject to the legal proceedings in this case. At the time of the argument I had indicated that I considered that a distinction existed with respect to the six sales in

which the offers had been accepted prior to the filing of the lis pendens. The case of *J and S Corporation* v. *Mortgage Associates, Inc.*, 41 Wis. 2d 418, casts doubt on this distinction. It may be that the time of the recording of the interests of these purchasers is the significant time. The Court in the *J and S Corporation* case, supra said at page 423:

> "The statutes makes immaterial the time when the holder of the unrecorded conveyance or encumbrance in fact received his interest."

For the purpose of this injunction, however, I have decided to exclude these particular transactions although the purchasers themselves may wish to proceed with some caution.

SALES TO MENOMINEES

Counsel has called the attention of the Court to the fact that a question has been raised as the result of this decision in regard to sales by the corporation to Menominees. This decision, of course, does not affect these sales in any way. In my view of the case which considers the plan and its implementation to be valid in every respect, I can see nothing that would in any way challenge the validity of sales to Menominees.

SETTLEMENT AGREEMENT

Counsel makes a very persuasive argument that this Court ought to permit the orderly settlement reached by some of the parties to this case to take its course. This agreement (made part of the record by affidavit) was entered into on July 9, 1972, prior to the decision in this case

but subsequent to the trial. It excludes this litigation. I am always aware of the desirable nature of a good settlement and recognize that many times it produces a better result than a disposition which follows the logic of the law. Assuming, however, that I am correct in my major premise as I must do, I do not see where I have any right to do more than to suggest or recommend a settlement.

PROSPECTIVE APPLICATION

Counsel has also urged that this Court apply its ruling prospectively only permitting all transactions which were entered into prior to the date of the decision to stand. The leading case of *Great Northern Railroad Company* v. *Sunburst Oil and Refining Company,* 287 U.S. 358, is cited for this approach. *Linkletter* v. *Walker,* 381 U.S. 618, and *Gottlieb* v. *Milwaukee,* 33 Wis. 2d 408 are also cited as more recent applications of this rule of law which limits retroactive application of a principle of law to avoid undue hardship. I am not sure that these cases which involve constitutional interpretations apply, but in any event, I believe that as a trial Court I ought not to adopt any such remedy.

CONFUSION RESULTING FROM THE DECISION

I would be of the opinion that it would be better for counsel to attempt to advance the case on appeal than to have the Court adopt some of the other suggestions to avoid unnecessary hardship to the interested parties. I can well understand the concern of counsel in this matter that an appeal of this case may result in a different result.

I would suggest to counsel that I would be glad to meet informally with them to expedite the making and signing of findings of fact and conclusions of law. One thing I

have noted is that some of the delays that have occurred resulted from waiting for exchange of briefs and authorities in the matter. I am concerned, of course, about the extent to which the decision may affect a large number of people. I am mindful too of the most regretable and unnecessary inconvenience to many persons which would result if the Supreme Court would reach a different decision on the basic question in the case. I will, therefore, make myself available at the earliest possible time that counsel wish to get out the findings of fact and conclusions of law.

Counsel at the time of the hearing on these motions for clarification have discussed some of the remaining aspects of this case which would have to be resolved eventually. I would prefer not to deal with any other remedies. It is my hope that the basic question could be resolved finally before anything further is done by this Court which would affect the rights of persons in these lands.

Dated this 26th day of October, 1972.

BY THE COURT:

/s/ *William J. Duffy*

Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT
MENOMINEE COUNTY
Case No. 33

HENRY L. TOMOW, SR., et al., Plaintiffs,

vs.

MENOMINEE ENTERPRISES, INC., et al., Defendants.

DECISION
(July 24, 1972)

FACTS

Counsel have stipulated to many of the facts in the formal stipulation covering 24 paragraphs. Most of the facts are agreed to, and only in a relatively narrow area is there a dispute.

The Menominee Indian Tribe was well established in Wisconsin 200 years prior to the appearance of the European settlers. Except for a small cession of land to the Stockbridge-Munsee Reservation, the last of a series of treaties between the United States and the Menominee Tribe occurred in 1854, "The Treaty of Wolf River." Under the treaty the Menominees ceded land to the United States, and the United States agreed to give to the Menominees the land on which the present Menominee County is laid out. Until termination, which became effective on April 30, 1961, tribal affairs were conducted by the General and Advisory Councils. The General Councils were meetings open to the entire tribe with all adult enrolled Menominees being able to vote. The Advisory Council created in 1928 was an elected body concerned primarily

with the business management of day-to-day affairs. Its actions could be overturned by a vote of the General Council or by the Secretary of the Interior.

In 1953 Congress by concurrent resolution instructed the Secretary of the Interior to recommend legislation for the withdrawal of the federal supervision over the Menominees as well as other named tribes. In 1954 Congress passed the Termination Act, P. L. 399, 25 U.S.C.A. 892-902. It was later amended on July 14, 1956, July 2, 1958 and September 8, 1960.

In November, 1957, a General Council of the tribe created the Coordinating and Negotiating Committee, hereinafter referred to as the C and N Committee. Its purpose was to develop a termination plan under the authority from the General Council which created it. In December of 1957 the final roles of membership in the Menominee Tribe were closed, and the membership list of 3,270 persons was published in the *Federal Register*. A "Termination Plan" was proposed to the General Council in a series of three meetings in January of 1959. As amended by those present, the plan was approved by a vote of 91 to 16 on January 17, 1959. Details for the implementation of the plan were contained within the plan itself.

The opening language of the plan reads as follows:

"The Plan consists of the following documents:

1. Statement of the Plan and Description of its Objectives and Goals (revised December 1, 1960).
2. Articles of Incorporation of Menominee Enterprises, Inc. (revised November 30, 1959).
3. By-Laws of Menominee Enterprises, Inc. (revised November 30, 1959).
4. Menominee Common Stock and Voting Trust (revised November 30, 1959).

5. Menominee Assistance Trust (revised November 30, 1959).

6. Menominee Enterprises, Inc., Bond Indenture (form of bond included) (revised November 30, 1959).

7. Menominee Indian Tribe, Certificate of Beneficial Interest.

"In addition the following documents are included by reference:

1. Resolution of General Council, Menominee Indian Tribe, January 17, 1959.

2. Resolution of General Council, Menominee Indian Tribe, July 27, 1959.

3. Resolution of Advisory Council, Menominee Indan Tribe, July 28, 1959.

4. Letter of Glen A. Wilkinson, Attorney for Tribe, to Secretary of Interior, July 31, 1959.

5. Letter from Acting Secretary of Interior to James G. Frechette, Chairman, Menominee Advisory Council, July 31, 1959.

6. Letter from Acting Secretary of Interior to James G. Frechette, Chairman, Menominee Advisory Council, October 30, 1959.

6a. Letter from George W. Abbott, Assistant Secretary of Interior to Jerome Grignon, Chairman, Menominee Advisory Council, January 9, 1961.

7. Copies of Chapters 258, 259 and 260, Laws of Wisconsin, 1959."

Pursuant to the plan, the trustees were elected by the General Council. The members of the C and N Committee as incorporators of Menominee Enterprises, Inc., hereinafter referred to as MEI, subscribed to all of the stock in MEI. The directors whose names appeared on the article, who had been previously chosen informally, were formally chosen by the trustees. The directors accepted the subscription of the committee. The Secretary of the Interior

advanced $327,000 of the funds he was holding in trust, and that money was used to pay for the stock. The corporation issued a single stock certificate to the C and N Committee for 327,000 shares of stock. The committee signed the Voting Trust Agreement and named as trustees those individuals previously approved by the General Council and transferred the stock in MEI held in their name to the Voting Trust. The trustees then issued certificates to enrolled Menominees as evidence of their interest in the stock the trustees held.

On August 10, 1967, the Board of Directors and the trustees jointly passed a resolution which reads as follows:

> "WHEREAS, there is no other means sufficiently capable of accomplishing the economic improvement of the Menominee community except by adoption and implementation of the Ernst & Ernst Report; and
>
> "WHEREAS, to provide necessary tax resources for Menominee County and/or the Town of Menominee and for the relief of taxation on Menominee Enterprises, Inc. (and the residents of Menominee County, Wisconsin), and to assure continued Menominee ownership thereof:
>
> "I. BE IT RESOLVED, that Menominee Enterprises, Inc. is authorized to proceed with the recommendations of the Ernst & Ernst Report as opportunity and feasibility permit; and
>
> "II. RESOLVED FURTHER, that the corporation is authorized to define economic development zones on its land in Menominee County, Wisconsin, not to exceed 8,760 acres in areas to be defined and described from time to time by the Menominee Common Stock & Voting Trust and/or the shareholders of the Corporation, whichever then holds the common stock; and

"III. RESOLVED FURTHER, that pursuant to Article XII of the Articles of Incorporation of Menominee Enterprises, Inc. within such economic development zones warranty deeds may issue as a form of land transfer, provided a sufficient form of quality control is a condition of such transfer, and provided always that sufficient areas of land on lakeshore be reserved for Menominee use."

On September 23, 1967, a referendum was held, and all holders of Voting Trust Certificates were invited to express their opinions. Of a total of 109,125 votes cast, 97,738 were for and 11,387 were against the resolution. Among the "yes" votes were 79,362 votes cast by First Wisconsin Trust Co. which voted the interests of minors and incompetents. The referendum was announced as "advisory," and the written material distributed referred to the use of warranty deeds.

On July 9, 1968, MEI and N. E. Isaacson and Associates, hereinafter referred to as Isaacson, entered into a joint agreement calling themselves Lakes of the Menominees, hereinafter referred to as LOM. They planned to develop and sell to persons including non-Menominees certain lands situated in that part of the economic zone and approved for development. The joint venture agreement was subject to the approval by the trustees which was given by unanimous resolution in July of 1968. In 1969 Isaacson and MEI agreed to increase the number of lots to be developed and sold from 1,800 to 2,600.

On February 4, 1972, at a Board of Directors meeting, the legal status of the LOM contract was raised. The original agreement stated that it dissolved as of December 31, 1971, unless extended by the parties. At a reconvened

meeting of the Board of Directors on February 11th, it was decided that the executive committee would meet with Isaacson to explore the possibility of negotiations on a contract.

On March 17, 1972, the Board of Directors voted in favor of continuing the LOM contract to December 31, 1972. The presidentof MEI thereupon confirmed the extension in writing to Isaacson which agreed to the extension. Since December 31, 1972, no action was taken by certificate holders or trustees concerning land sales to non-Menominees.

In April, 1972, six trustees out of eleven signed affidavits at the request of Plaintiffs' counsel that they opposed the sales to non-Menominees. If a vote were taken, they indicated they would vote against such sales.

The original pleadings were amended to set forth these facts and to allege a lapse of the contractual relationship. A motion for a temporary injunction against any further sales was denied by this court in a decision dated the 24th of April, 1972.

The Termination Act, 25 U.S.C.A., contains the following language:

> 25 U.S.C.A. 893
>
> ". . . the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe."

25 U.S.C.A. 896

"The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to Section 893 of this title, and that it conforms to applicable Federal and State laws."

Others facts will be mentioned in the decision.

ISSUES

This suit is by 162 Menominees against Menominee Enterprises, Inc. and the officers and directors of Menominee Enterprises, Inc., and the trustees of the Menominee Common Stock and Voting Trust and Isaacson, a partner with Menominee Enterprises, Inc. in the Legend Lake Development.

Plaintiffs contend that the Voting Trust was not set up pursuant to Section 180.27, Wisconsin Statutes, which reads as follows:

> "Any number of shareholders of a corporation may create a voting trust . . . by entering into a written agreement . . ." (Section 180.27 W.S.A., App. p. iii.)

Plaintiffs' also contend that the trustees did not have the power or the authority under Article XII of the Articles of Incorporation to authorize the sale of lands to non-Menominees. In the amended complaint referred to above, plaintiffs also contend that even if the LOM agreements were originally valid that due to the automatic termination of the agreement and the present make-up of the trustees there was no longer any authority for the sale of land after December 31, 1971.

The defendants contend, of course, that the trust was validly set up and that Article XII was complied with by the unanimous vote of the trustees and that the failure to take action prior to the termination date established in the contract was cured by action taken afterwards and properly ratified. Defendants also take the position that the main issues raised by the plaintiffs are res judicata as the result of two earlier circuit court cases.

ISSUE OF RES JUDICATA

The two cases on which defendants rely are *White, et al.* v. *Kenote, et al.* and *Lakes of the Menominees* v. *Agnes Dick, et al.*, both Menominee County Circuit Court cases. In the *White* case, the trial court dealt with certain provisions of the Voting Trust and the Assistance Trust as they related to the holding of an election to determine whether the Voting Trust should be renewed pursuant to Article XII paragraph 2 of the Voting Trust Agreement.

The decision of that court assumes the validity of both the Voting Trust and the Assistance Trust which in the argument of the defendants has the effect of making this matter res judicata since the validity of the trust could have been raised at the time of the trial. In my view of the law, the Voting Trust is valid. Therefore, this issue is not dealt with at length. However, in the presentation of the case, I attempted to permit counsel to make as complete and full a record as each felt they should.

In the *Lakes of the Menominees* case, individual members of an organization called DRUMS were enjoined from picketing the business office of the Legend Lakes project of LOM. Some of them are plaintiffs here. I doubt very seriously that the issue of the authority of the trustees to

vote for the sale of lands to non-Menominees would be properly litigated in that matter. In my judgment it would be collateral and not necessary to the plaintiffs' case. The trial court indicated he had not made a study of the title issue although he indicated he would approve a finding of title in LOM. (Exhibit 25, page 40) In his findings of fact, he found that the LOM had deeds from MEI. In his conclusions of law, he does not mention title.

The principle of res judicata applies when a prior lawsuit has involved indentity of the thing sued for, identity of the causes of action, identity of the parties and the quality and capacity in which they appear in the litigation. *Gohr* v. *Beranek* (1954) 266 Wis. 605, 609, 64 N.W. 2d 246; *Cohan* v. *Associated Fur Farms, Inc.* (1952) 261 Wis. 584, 598, 53 N.W. 2d 788, 795; and *Conway* v. *Division of Conservation* (1971) 50 Wis. 2d 152, 160, 183 N.W. 2d 77.

I have concluded that this case cannot be decided on the principles of res judicata because the issues as well as the parties are substantially different.

ISSUE OF THE VOTING TRUST

Defendants make a very urgent argument that the failure to follow the statutory requirements of Section 182.07 is contrary to the Termination Act which provides in part as follows:

> "... that it conforms to applicable Federal and State laws."

Defendants make the point that this section of the Wisconsin Statutes is a codification of the common law rule that voting trusts must be in writing to comply with the Statute of Frauds.

Plaintiffs' counsel cites a number of precedents from different jurisdictions which, in effect, do indicate that courts have been concerned with the manditory nature of the compliance with similar statutes. These cases suggest that public policy considerations are involved which would be in addition to the Statute of Frauds purposes. It is my judgment that neither the purposes contemplated by the Statutes of Frauds or the public policy considerations raised by plaintiffs are involved here. The plan clearly contemplates the procedure which was actually followed. As defendants' counsel points out, the members of the C and N Committee signed the written agreement of trust in accordance with the plan. The plan also provided for the transfer of the shares of stock to the trust sometimes in advance of termination even before the corporation owned the assets of the Menominee Tribe.

Plaintiffs' counsel in answer to this points out that in the legislation passed in 1954 establishing the Menominee Rolls each Menominee was given a vested interest. From this fact counsel argues that a proper compliance with Section 180 would require a written consent of each holder of such interest. It is my judgment that this

literal interpretation is probably overtechnical. I am impressed by the reasonableness of the method established in the plan contrasted with the unwieldy procedure of having the shares issued to the individual Menominees some of whom would be minors or incompetents and then placed in trust under the procedural requirements of Section 180.27. It is obvious that a trust arrangement was considered in the best interests of the Menominees in accordance with their own plan. It seems to me the procedure adopted to accomplish this was eminently sensible. I cannot conclude that the plan approved by the Secretary of the Interior fails because it violates applicable state law in this respect.

It is my judgment, therefore, that the Voting Trust is not invalid for a failure to comply with Wisconsin law. I should note that plaintiffs contend that other individuals in Wisconsin would not be bound by a voting trust agreement which failed to follow this statute and that, therefore, there is a violation of the Fourteenth Amendment ". . . nor shall any state . . . deny to any person with its jurisdiction the equal protection of the laws."

Also defendants claim that the Fifth Amendment to the Federal Constitution is violated: ". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law. . . ."

POWER OF THE TRUSTEES TO VOTE THE SHARES AUTHORIZING THE SALE OF LAND

Parol Evidence Rule

Defendants claim throughout that the authority of the trustees is contained within the four corners of the written instruments comprising the plan; that there is no ambiguity and consequently no basis for the reception

of parol evidence. *Pines* v. *Perssion,* 14 Wis. 2d 590, 594, 11 N.W. 2d 409 (1961); *Hart* v. *Hart,* 117 Wis. 639, 648-649, 94 N.W. 890 (1903).

Defendants' counsel further argues that the parol evidence rule operates with special force when the meaning in a federal statute or regulation is at issue.

> "The legislative will must be ascertained from the text of a statute if the words are clear and plain and the whole enactment internally cohesive." *Fisher Flowing Mills Company* v. *United States,* 270 F.2d 27, 30 (9th Cir. 1958).

It is pointed out that the language in the trust agreement uses the words, "holders . . . entitled to vote thereon." Attention is also drawn to Article III of the Trust Agreement which states that the stock held may be voted without limitation except as expressly provided. Emphasis is placed by defendants' counsel on the language contained in paragraph one of Article X of the Trust which provides as follows:

> "The Trustees may construe this agreement, and their construction made in good faith shall be conclusive and binding upon the parties hereto. . ."

Counsel for the plaintiffs on the other hand insist that extrinsic evidence is admissible to show the intent of the parties because there is an ambiguity contained in the writings. Their brief makes this statement:

> " 'Holders of two-thirds of the outstanding shares' becomes functionless when applied to the trustees. Each has an interest in all the shares. In order to obtain trustee approval under that provision, the Board must get a unanimous decision from all the trustees thereby automatically including 100 percent of the shares. Or does it mean two-thirds of the holders?"

Still another interpretation in addition to the two mentioned in the paragraph quoted above is the third and probably more logical one that a simple majority of the trustees could authorize the sale of real estate if this authority granted in this article can be exercised by the trustees. At the time of the adoption of the pertinent language in Article XII, there was a provision for only seven trustees. This was subsequently changed to eleven.

I have concluded that the language is ambiguous as it relates to the interum period during which time the trustees held the voting shares. The situation in April of 1972 when six of the eleven trustees signed an affidavit that they would oppose the sale of lands to non-Menominees highlights the problem of interpretation.

The parol evidence rule excludes extrinsic evidence unless the writing is ambiguous, unclear, indefinite or contradictory.

> "In determining whether a writing is ambiguous, the court does not merely examine the document, but scrutinizes the language of the document in light of the surrounding circumstances. Consequently, parol evidence must at least be provisionally admitted in order to develop these circumstances. If the court concludes that on the basis of such extrinsic proof a reasonable man could interpret the writing to mean anything other than what the ordinary meaning of the words indicate, then parol evidence may be received to establish what was meant by the writing. Or if the parol evidence shows that a literal application of the language of the writing would lead to an absurd result, the extrinsic proof may be relied upon to arrive at a rational construction of the writing which effectuates what appears to have been the intention of the parties." *Wisconsin Civil Trial Evidence* §9.31 Determining Existence of Ambiguity.

In the course of the trial, extrinsic evidence was permitted over objection of counsel for the defendants which I believe was procedurally the correct method to follow.

> "(2) Procedural Aspects of Application of Rule. The parol evidence rule may be the basis for rejecting evidence when it is offered, or for refusing to consider evidence, which has been received, from the ultimate decision at the end of the trial. Frequently, the court is unable to determine whether the parol evidence rule should be applied until sufficient extrinsic evidence has been developed in the record. Regardless of when the rule is applied, however, the critical question is whether the writing expresses the complete and correct integration of the terms on which the parties agreed." *Wisconsin Civil Trial Evidence* §9.14 Substantive and Procedural Aspects.

I am aware that the decision whether to admit extrinsic evidence involves a judgment to be made by the trier of facts. I am aware that this brings into play a number of considerations on which reasonable people can differ. Certainly in this case they have differed. Counsel for the defendants have argued throughout that I avoid making a decision on rhetoric. Underlying our discussions was an appreciation of the fact that American history is replete with instances where the Indians have claimed that land was wrongfully taken from them. I would not be candid if I indicated that this was not a concern of this Court. At the same time I did make an effort to separate this general proposition from the statements and actions of the individuals in this case in an effort on my part to find out what the true intent of the Menominees was with respect to the sale of land.

Ordinarily our law does not favor restrictions on alienation, and a proper construction of the trust agreement would probably place the power of sale in the trustees.

However, I consider that this is not an ordinary trust agreement but one that requires a consideration of the background and an interpretation of the plan against the proper setting. I cannot escape the conclusion that the systematic sale of these lands for purposes of obtaining revenue with the additional purpose of building a tax base was not within the contemplation of the Menominees at the time of the adoption of the plan.

Intent

On the question of the intent to be found in the plan, I start with the proposition that it is basically the plan of the Menominee Indians. The Secretary of the Interior approves of the plan under the federal statute if it meets certain conditions. I am of the opinion that to determine the intent of the framers of the plan that the minutes of the tribal meetings as well as the minutes of the Advisory Council and the C and N Committee were all proper and competent evidence.

I find from a reading of the minutes of the General Council of November 6th and 7th, 1957, and minutes of the Advisory Council of January 3, 1957, that the council retained authority over the C and N Committee. Minutes of the meeting of August 14, 1958, (Plaintiffs' Exhibit No. 7) indicate at the outset a deep concern that the land would get into the hands of outsiders. An informal vote resulted in voting for leases only at that time and a small number for a combination of leases and sales with options to repurchase. At a General Council meeting called for January 9th and 10th, 1959, Article XII was originally presented reading as follows: (Plaintiffs' Exhibit No. 9)

> "Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the

corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation, other than real property designated by the board of directors as forest lands; provided, however, that the board of directors, or the appropriate officers at its direction, shall have authority to lease, mortgage or pledge all or any portion of such property, on such terms and conditions as it shall deem advisable, without shareholders' consent."

In the meetings of both January 9th and 10th, 1959, challenges were made to giving the Board of Directors power to sell land. All of the expressed sentiment was against sales of any land. No one spoke in favor of any limited or emergency sales. Even one to the State of Wisconsin for park purposes was discussed adversely by Mr. Gordon Dickie, a member of the C and N Committee who was a witness in this case. The meeting was adjourned until January 17th when the chairman announced there was no longer a quorum.

On January 17th Article XII was resubmitted in a form which gave no power of sale to the Board of Directors without approval of two-thirds of the shareholders. It provided that the Board of Directors would have authority to lease real property other than lands designed as forest lands. This was the language approved by the General Council on the meeting of January 17, 1959. (Plaintiff's Exhibit No. 11)

There was throughout the tribal discussions of Article XII a concern that individual Menominees should be protected in the rights to the land that they had been occupying. On April 14, 1959, the Advisory Council passed a resolution to submit an amendment to Article XII. An explanation was sent to individual Menominees

suggesting that the Board of Directors be given the power of sale to Menominees pointing out that representatives of the State of Wisconsin had objected to this restriction on alienation. (Plaintiffs' Exhibit No. 14)

At the January 17th meeting, Mr. George Kenote, another member of the C and N Committee who testified on behalf of the defendants in this case had explained to the council that securring a two-thirds approval would make it difficult to sell individual homesites.

The final language gave the Board of Directors this authority instead of the leasing arrangements. The additional language read as follows:

> ". . . and provided, further, that the board of directors, or the appropriate officers at the direction of the board of directors, shall have authority to sell and convey to individuals, who were enrolled tribal members under Public Law 399 (final roll) or their heirs at law, individual parcels which in the aggregate will not exceed 14,500 acres for homesites, agricultural use or other development, which lands shall be zoned for that purpose and shall not include lands designated as forest lands."

I found no discussion in any of the minutes as to whether the trustees would have the right to exercise the authority to sell contained in Article XII during the period that the shares were in trust. I do find contained in all these writings a strong, consistant opposition to the sale of any lands even to the State of Wisconsin for park purposes. Most of the plan was not discussed in any depth. The attorney general in his report of the plan (Defendants' Exhibit No 35) complained of this. Proportionately the sale of land was more thoroughly discussed.

No attack is made by anyone on the good motives of the trustees. Evidence was offered by defendants to show the serious financial troubles which beset the corporation. There was a need for revenue and the advantageous tax base created by the sale and improvement of these lots. It is easy to understand how the trustees were motivated to seek this solution to the financial problems. Objection was made to the admission of this evidence. I did consider this evidence, but I do not believe that it is persuasive with respect to the power of the trustees to exercise the authority to sell.

Counsel for defendants point to the Attorney General's report as indicating that the power of sale was in the shareholders. The exact language of the report reads as follows: (Defendants' Exhibit No. 35 p.4)

> "Sale of land is expressly prohibited except pursuant to a vote of two-thirds of the stockholders who should be the voting trustees for at least 10 years."

Counsel also points to a June 1, 1959, edition of the *Menominee News* which was sent out to all tribal members. This statement appears at page 16 of Defendants' Exhibit 37:

> ". . . but sale of land is prohibited unless two-thirds of the stockholders vote otherwise, and in this case the voting stockholders would be the voting trustees for at least 10 years."

I consider these two statements can be reconciled as readily on the basis of reassuring the Menominees as alterting them to the probability of sale during the period the stock was held in trust.

One other incident is cited by defendants' counsel in which then Attorney General John Reynolds asked one

Jennie Wesso about land sales at a meeting held in Keshena in April of 1959. She replied that a two-thirds of the majority vote of the Menominee Tribe would be necessary. Then Mr. Reynolds asked her if she understood that the trustees would be voting the stock instead of the tribe. She then indicated she did understand. I think this incident was significant because it was the only written record of discussion of this kind, and it certainly is far short of indicating that even one Menominee clearly understood that the land would be subject to sale by the trustees.

Article XII is given the same dignity in the Articles of Incorporation as Article X which provides that the articles may be amended by affirmative vote of the holders of at least two-thirds of the shares entitled to vote thereon. It seems improbable to me that from all of the evidence that one could conclude that the Menominees ever intended that the trustees should exercise the power of sale of lands as an ordinary business operation. It is in my opinion out of harmony and out of character with all of the expressed sentiments contained in the tribal minutes. Mr. Kenote and Mr. Dickie both testified to oral conversations in which they explained this to individual Menominees. I have decided to admit this evidence, but its persuasiveness is far less than the writings.

I am most impressed by the deliberate selection of a very difficult and involved machinery to authorize the sale of land. Acquiring the consent of two-thirds of all the shareholders is so different from the simple matter of securring the approval of the trustees whether it is unanimous, two-thirds or a simple majority. It also appears to me to involve a kind and a quality of consent by the Menominee people which cannot be supplied by

a few persons sitting as trustees no matter how conscientious and concerned they are for the well-being of the beneficiaries for whom they are acting.

REMEDIES

At pretrial discussions, although I do not have a written note of it, a procedure was discussed to permit the Court to make a ruling on the legality of the sale of lands without taking evidence in support of any of the remedies other than the injunction. Even though this was not reduced to a formal stipulation, the trial did proceed on that basis. In argument counsel pointed out the confusion that would ensue if the legality of titles was challenged since many of the lots have been sold and people have obtained rights in them. It should be pointed out that this suit does not attempt to reach any of the sales made earlier. The pleadings specifically exclude earlier sales. I certainly do not intend to pass any judgment on what should be the remedy with respect to any land already sold prior to suit or since its commencement. I do not believe I should consider this problem in connection with deciding whether there was power to sell.

Counsel have also acquainted the Court with a settlement that was reached involving future sales of lots, although it was never made part of this record and probably should not be.

COUNSEL

I have appreciated the excellence of all counsel in this case representing both plaintiffs and defendants. I have received most helpful briefs. Their industry and candor was outstanding. I did not think I should pass up this opportunity to compliment them.

Realistically I look forward, in the absence of a complete settlement of this matter, to an appellate review of this decision.

I would, therefore, limit my judgment with respect to remedies at this time to the granting of an injunction against any further sales of lands with the understanding that jurisdiction would be retained to consider evidence in support of other remedies at a later date.

Counsel for the plaintiffs may prepare findings of fact and conclusions of law in accordance with this decision.

Dated at Green Bay, Wisconsin, this 24th day of July, 1972.

BY THE COURT:

/s/ *William J. Duffy*
William J. Duffy
Circuit Judge

APPENDIX C

STATE OF WISCONSIN CIRCUIT COURT

MENOMINEE COUNTY
Case No. 33

HENRY L. TOMOW, SR., et al.,

Plaintiffs,

vs.

MENOMINEE ENTERPRISES, INC., et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Issued: Nov. 16, 1972)

This is a Menominee County action, commenced by 162 Plaintiffs who are either shareholders and/or holders of voting trust certificates and who brought this action in the right of the Menominee Enterprises, Inc., being shareholders of not less than three percent (3%) of the MEI shares issued and outstanding;

A summons and complaint were filed in the Circuit Court for Menominee County, Wisconsin on October 25, 1971, and a Lis Pendens containing the names of the parties, the object of the action and a description of the land involved in the action was filed with the office of the Register of Deeds in Menominee County on October 25, 1971;

On November 11, 1971, the Defendants, other than Georgianna W. Ignace and Ada Deer, moved the court:

1. For an order granting them summary judgment dismissing Plaintiffs' complaints on those merits;

2. In the alternative, for an order advancing the case on the calendar for trial in accordance with Wis. Stats. §270.12(2).

On November 18, 1971, an Affidavit of Prejudice was filed, and, subsequently, by Order of the Wisconsin Supreme Court dated November 24, 1971, I, William J. Duffy, Circuit Judge, Branch III, for the Fourteenth Judicial Circuit Court, was assigned to act in the matter in the Tenth Judicial Circuit;

On November 19, 1971, the Defendants, other than Georgianna W. Ignace and Ada Deer, filed an answer to the complaint;

On November 19, 1971, the Defendants, Georgianna W. Ignace and Ada Deer served and filed identical answers to the original complaint where they admitted each and every allegation of the original complaint;

On December 10, 1971, the motion for summary judgment and in the alternative to advance the case for early trial was argued and on February 7, 1972, the motion for summary judgment was dismissed;

On April 21, 1972, a hearing was held by the Court on Plaintiffs' motion requesting a temporary injunction prohibiting sale of land to non-Menominee while the action for permanent relief was pending. The Court denied Plaintiffs' request on April 24, 1972;

On April 21, 1972, a hearing was also held by the Court on Plaintiffs' motion requesting leave to file a Supplemental Complaint which was approved by Stipulation on said date. The Supplemental Complaint alleged facts material to the case which occurred after the complaint was made, and added Carol Dodge, Gordon Keshena, and

Robert Deer as Defendants to the action as a result of subsequent elections which elected Carol Dodge as trustee and Robert Deer and Gordon Keshena as directors of Menominee Enterprises;

Copies of the Summons, Complaint, and Supplemental Complaint were served on Carol Dodge, Gordon Keshena, and Robert Deer. The three new Defendants did not file answers to the original Complaint or to the Supplemental Complaint;

On May 2, 1972, an answer to the Supplemental Complaint was filed on behalf of the Defendants other than Georgianna W. Ignace and Ada Deer.

The Defendants Georgianna W. Ignace and Ada Deer did not file an answer to the Supplemental Complaint although a Supplemental Complaint was served upon their Attorney, J. Edison Woods, of Madison, Wisconsin. This action came for trial to the Court, without a jury, on the 8th day of May, 1972. A Stipulation was entered into by the parties. The Plaintiffs appeared by their Attorneys, Ruth S. Downs and Warren A. Kenney of the Wisconsin Indian Legal Services of Madison, Wisconsin and Attorney Joseph F. Preloznik of Madison, Wisconsin; and the Defendants, excepting the Defendants Georgianna W. Ignace and Ada Deer, Carol Dodge, Gordon Keshena, and Robert Deer, appeared by their Attorney, Gilbert W. Church, of the Milwaukee law firm of Foley and Lardner; the Defendants Georgianna W. Ignace, Ada Deer, Carol Dodge, Gordon Keshena, and Robert Deer did not appear either in person or by counsel at the trial;

On July 14, 1972, there was further argument before the Court; at that time Gilbert W. Church appeared for the Defendants other than Georgianna W. Ignace, Ada

Deer, Carol Dodge, Gordon Keshena, and Robert Deer and N. E. Isaacson. Vance Waggoner appeared on behalf of N. E. Isaacson and Ruth S. Downs of Wisconsin Indian Legal Services and Joseph F. Preloznik appeared on behalf of the Plaintiffs;

On July 24, 1972, the Court issued a written decision wherein certain issues were determined and jurisdiction was retained for the later determination of other issues;

Thereafter, the Defendant, N. E. Isaacson & Associates, Inc. brought two Motions on before the Court seeking supplemental decisions of the Court clarifying points in the Decision of July 24, 1972;

These two Motions were heard by the Court on July 31, 1972, and on August 10, 1972, respectively, and the Court having heard oral argument of all Counsel and having received and considered Statements of Position and Briefs from Counsel, a second and supplemental Decision disposing of these Motions was rendered on October 26, 1972;

NOW, THEREFORE, the Court hereby makes and files the following Findings of Fact and Conclusions of Law in accordance with its Decisions of July 24, 1972, and October 26, 1972, and the record herein.

FINDINGS OF FACT

1. The Menominee Indian Tribe was well-established in Wisconsin two hundred years before the European settlers began their westward movement across the United States.

2. Except for a small cession of land for the Stockbridge-Munsee Reservation, the last of a series of treaties between the United States and the Menominee Indian

Tribe was the "Treaty of Wolf River" of 1854. Under this Treaty, the Menominee Indians, among other things, ceded land to the United States, and the United States agreed to give certain lands to the Menominee of which the larger part constitutes present-day Menominee County.

3. Until termination became effective on April 30, 1961, tribal affairs were handled by the tribe in General Councils and by the Advisory Council. The General Councils were meetings open to the entire tribe, at which all adult enrolled Menominees could vote. The Advisory Council, created in 1928, was an elected body that concerned itself primarily with business management of day-to-day affairs. Its actions could be overturned by a vote of a General Council or by the Secretary of the Interior.

4. In 1953, Congress, by concurrent resolution, instructed the Secretary of the Interior to recommend legislation for the withdrawal of Federal supervision over the Menominees, as well as other named tribes.

5. In 1954, Congress passed the Termination Act, P.L. 399, 25 U.S.C.A. 892-902. It was later amended on July 14, 1956, July 2, 1958, and September 8, 1960.

6. In November, 1957, a General Council of the Tribe created the Coordinating and Negotiating Committee, herein called the "Committee". Its function was to develop a termination plan such as was called for by the Termination Act. It acted under authority from the General Council which created it and under the Advisory Council.

7. In December, 1957, the final rolls of membership in the Menominee Tribe were closed and the membership list of 3270 persons was published in the Federal Register.

8. A "Termination Plan" was proposed to a General Council in a series of three meetings in January of 1959. As amended by those present, the Plan was approved by a vote of 91 to 16 on January 17, 1959. All of the expressed sentiment was against sales of land. No one spoke in favor of any limited or emergency sales.

9. Part of that Plan called for the creation of a corporation under Wisconsin Law known as Menominee Enterprises, Inc. and for the creation of a Menominee Common Stock and Voting Trust, herein called the "Voting Trust." I found no discussion in any of the minutes as to whether the trustees would have the right to exercise the authority to sell contained in Article XII during the period that the shares were in trust.

10. Individual members of the Tribe did not enter into written agreements creating the voting trust. Whatever legal assent exists on the part of the Menominee Indians to the establishment of the voting trust, emanates from the votes of the General Council.

11. In completing the corporate arrangements, the following procedure was followed:

a. The initial Trustees of the Voting Trust were elected by the General Council;

b. The members of the Coordinating and Negotiating Committee signed as incorporators of Menominee Enterprises, Inc., herein called "MEI", a corporation organized under the laws of Wisconsin.

c. The Coordinating and Negotiating Committee subscribed to all the stock of MEI. During this organizational meeting, the elected directors, whose names appeared on the Articles and who had been previously chosen informally, were formally chosen by the Trustees.

d. The Directors of Menominee Enterprises, Inc., accepted the subscription of stock previously made by the members of the Coordinating and Negotiating Committee.

e. The Secretary of the Interior advanced the sum of $327,000.00 of funds he was holding in trust as payment for the 327,000 shares of stock;

f. Menominee Enterprises, Inc. issued a single stock certificate to the Co-ordinating and Negotiating Committee for 372,000 shares of stock.

g. The Co-ordinating and Negotiating Committee executed the Voting Trust Agreement, naming as Trustees of the Voting Trust those individuals previously approved by the General Council.

h. The Co-ordinating and Negotiating Committee subsequently transferred the stock in Menominee Enterprises, Inc., which the MEI held, to the Menominee Common Stock & Voting Trust.

i. The Trustees, thereupon, issued Voting Trust Certificates to the enrolled members of the Menominee Tribe as evidence of the beneficial interest of such enrolled members in the stock held by the Trustees.

12. The Articles of Incorporation of Menominee Enterprises, Inc., contain, among other things, the following provision:

"ARTICLE VII — VOTING TRUST"

"The shareholders of the corporation may, as provided by law, create a voting trust for the purpose of conferring upon trustees the right to vote or otherwise represent their shares, by entering into a writ-

ten voting trust agreement specifying the terms and conditions of the voting trust, and it is contemplated that all of the shares initially issued by the corporation shall be placed in a voting trust."

13. Wisconsin Statute 180.27, contains the Voting Trust provisions as follows:

"180.27 Voting trust. Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares by entering into a written voting trust agreement specifying the terms and conditions of the voting trust by depositing a counterpart of the agreement with the corporation at its registered office and by transferring their shares to such trustee or trustees for the purposes of the agreement. . . ."

14. The Articles of Incorporation of Menominee Enterprises, Inc., contain, among other things, the following provision:

ARTICLE XII — SALE OF LAND

"Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation. . . ."

15. The Agreement creating the Menominee Common Stock & Voting Trust contains, among other things, the followng provisions:

"III. POWERS OF TRUSTEES"

1. The Trustees, in respect of the stock held by them hereunder, are hereby vested as owners of such stock (without limitation except as herein otherwise

expressly provided) with all of the rights, powers, and privileges of every kind and character of owners thereof, including, without limiting the generality of the foregoing (a) the right to vote the same, as hereinafter provided, for every purpose, ..."

16. By two deeds, both dated April 26, 1961, and recorded September 10, 1961, in the Office of the Register of Deeds for Menominee County, Wisconsin, the United States of America conveyed to Menominee Enterprises, Inc., all of the real estate which, for practical purposes, previously constituted the Menominee Indian Reservation, and presently constitutes Menominee County, Wisconsin, which real estate included the lands at issue in this action.

17. On August 10, 1967, a Joint Meeting was held by the Board of Directors of Menominee Enterprises, Inc., and the Trustees of the Menominee Common Stock & Voting Trust at Neopit, Wisconsin. The eight Directors and seven Trustees unanimously adopted the following Resolution:

"WHEREAS, there is no other means sufficiently capable of accomplishing the economic improvement of the Menominee community except by adoption and implementation of the ERNST & ERNST REPORT; and

WHEREAS, to provide necessary tax resources for Menominee County and/or the Town of Menominee and for the relief of taxation on Menominee Enterprises, Inc. (and the residents of Menominee County, Wisconsin), and to assure continued Menominee ownership thereof;

I. BE IT RESOLVED, that Menominee Enterprises, Inc. is authorized to proceed with the recommendations of the Ernst & Ernst Report as opportunity and feasibility permit; and

II. RESOLVED FURTHER, that the Corporation is authorized to define economic development zones on its land in Menominee County, Wisconsin, not to exceed 8,750 acres in areas to be defined and described from time to time by the Menominee Common Stock & Voting Trust, and/or the shareholders of the Corporation, whichever then holds the common stock; and

III. RESOLVED FURTHER, that pursuant to Article XII of the Articles of Incorporation of Menominee Enterprises, Inc., within such economic development zones warranty deeds may issue as a form of land transfer, provided a sufficient form of quality control is a condition of such transfer, and provided always that sufficient areas of land on lakeshore be reserved for Menominee use."

18. On September 23, 1967, a meeting was held in which all Menominees who held Certificates (except minors and incompetents whose interests were voted by their special trustee, First Wisconsin Trust Co.) were invited to express their opinions on the Resolution of August 10, 1967. Of a total of 109,125 votes cast, 97,738 were for and 11,387 were against the resolution. Among the "yes" votes were 79,362 votes cast by First Wisconsin Trust Co. The referendum was announced as "advisory" and the written material distributed referred to the use of warranty deeds.

19. On July 9, 1968, Menominee Enterprises, Inc., a Wisconsin corporation, and N. E. Isaacson & Associates, Inc., also a Wisconsin corporation, entered into an Agreement whereby they established a joint venture to be known as "Lakes of the Menominees". They planned to develop and sell to persons, including non-Menominees certain lands situated in that part of the economic zone approved for development.

20. By the terms of the Agreement of July 9, 1968, the Partnership was entered into "for the purpose of holding, developing and selling the lands referred to" in the Agreement, which lands consisted of approximately 5,170 acres located within the economic development zone referred to in the Joint Resolution of August 10, 1967.

21. The Agreement of July 9, 1968, was approved unanimously by the Trustees of the Menominee Common Stock & Voting Trust.

22. Menominee Enterprises, Inc., conveyed approximately 5,170 acres of land "for the purpose of holding, developing and selling the lands referred to" in the Lakes of the Menominees Joint Venture Agreement, by means of seven Warranty Deeds, all seven of which were dated and recorded in the Office of the Register of Deeds for Menominee County, Wisconsin, prior to the commencement of this action.

23. The Agreement of July 9, 1968, was performed to a substantial degree, and in 1969 Isaacson and MEI agreed to increase the number of lots to be developed and sold from 1800 to 2600 all of them to be laid out on the land mentioned in paragraphs 21 and 22, supra.

24. On or about March 11, 1969, LOM applied for a permit to construct a third dam in the Legend Lake project.

25. On October 15, 1971, Isaacson asked MEI if it would agree to try to sell out the project in 1972 and would approve incurring additional selling costs beyond the Agreement ceiling of 30 percent. A motion was passed to refer the matter to the LOM Management Committee to act within their discretion.

26. At their January 15, 1972, meeting the LOM Land Management committee met and agreed upon a budget for 1972.

27. At the February 4, 1972, Board of Directors meeting new Director Wilber raised the question of the status of the LOM contract which states that it dissolves December 31, 1971, unless extended by the parties.

> "Mr. Dodge explained the financial advantages of a stepped-up promotional sales campaign (cost to 30 percent of projected five million in sales) which was agreeable to the Board at the October 15th meeting. The Board did not specifically "extend the contract" but turned it over to the Management Committee, who then went over the promotional budget of about $1.50 million and agreed that every effort would be made to "sell out" the remaining lots in 1972. However, the Committee waited to see if there would be any further instructions from the Board after election of new Directors on November 27th (annual Meetings) but by January 10th decided to proceed on the instructions they already had."

After a discussion, a unanimous resolution was passed to obtain a legal opinion regarding the contract.

28. At the reconvened Board of Directors meeting February 11, 1972, further discussion took place regarding the LOM contract. It was finally decided, without formal motion, that the Executive Committee would meet with Isaacson to explore the possibilities of negotiations on the contract.

29. At the February 24, 1972, Board meeting a motion to affirm the contract was withdrawn after much discussion. A motion to ask the Executive Committee to sit down with Mr. Isaacson and whomever else they wanted was unanimously passed. A motion was passed to have an ad-

visory referendum of shareholders on the LOM agreement. Estimated liquidation costs of LOM were presented to the Board by Treasurer Boyd.

30. On March 17, 1972, the Board of Directors voted in favor of continuing the LOM contract to December 31, 1972. The President of MEI thereupon confirmed the extension in writing to N. E. Isaacson and Associates, Inc., which agreed to the extension.

31. Since December 31, 1971, no action has been taken by the certificate holders or Trustees concerning land sales to non-Menominees. In April, 1972, six of the then eleven Trustees of the Menominee Common Stock & Voting Trust—none of whom was a Trustee at the time the Joint Resolution was adopted on August 10, 1967, nor at the time the Trustees approved the Agreement of July 9, 1968—signed affidavits at the request of Plaintiffs' Counsel, stating that they were opposed to land sales to non-Menominees, and that, if a vote were taken on the question, they would vote against making such sales.

32. At the time the Lis Pendens was filed herein, there existed six (6) contracts for the sale of Legend Lake properties between Lakes of the Menominees and individual third party purchasers that had not been completed and are still pending.

33. In *White, et al.* v. *Kenote, et al.* a Menominee County Circuit Court case, the trial court dealt with certain provisions of the Voting Trust and the Assistance Trust as they related to the holding of an election to determine whether the Voting Trust should be renewed pursuant to Article XII, paragraph 2 of the Voting Trust Agreement.

34. In *Lakes of the Menominees, Agnes Dick, et al.*, another Menominee County Circuit Court case, individual members of an organization called DRUMS were enjoined from picketing the business office of the Legend Lake project of Lakes of the Menominees.

35. I find that throughout the Tribal Councils and negotiating committee meetings and other negotiations as reflected in the minutes and testimony that there was clear intent held and expressed on the part of the Menominee Tribal members against the sale of any lands except as it was later amended by a referendum to provide for sales of homesites to Menominees.

36. No issue has been raised nor any evidence offered in this case attacking the good motives or good faith of any of the Parties to this action.

CONCLUSIONS OF LAW

1. Principle of *res judicata* does not apply to the instant case based on the two Menominee County Circuit Court cases, *White et al.* v. *Kenote, et al.* and *Lakes of the Menominees* v. *Agnes Dick,* because the issues as well as the parties are substantially different.

2. Voting Trust is not invalid for a failure to comply with Wisconsin law; that there was a substantial compliance with the purposes of the law.

3. Article XII of the Articles of Incorporation of Menominee Enterprises, Inc., requiring the "affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote" before the Corporation may sell land to non-Menominees is ambiguous as it relates to the period of time during which the Corporation's stock is held by the Voting Trust.

4. The seven conveyances of land made by Menominee Enterprises, Inc., to Lakes of the Menominees, a partnership, prior to the commencement of this action, were made without the necessary approval required by Article XII of the Articles of Incorporation and were an improper exercise of the Corporation's power to convey land and are, therefore, invalid.

5. The seven conveyances of land made by Menominee Enterprises, Inc., to Lakes of the Menominees, a partnership in which Menominee Enterprises held a one-half interest, did not constitute executed corporate transactions but were part of an overall joint venture for the sale of these lands, and therefore sales made subsequent to the commencement of this action and the filing of the Lis Pendens, are subject to the jurisdiction of this court.

6. The Defendants herein shall be enjoined from making any further sales of land to non-Menominees as defined in Exhibit A and B of the Complaint until further order of this Court.

7. The Defendants may carry out the terms of the six contracts for sale which were entered into by the purchasers prior to the commencement of this action and the filing of the Lis Pendens.

8. The Court will retain jurisdiction of this case for the purpose of receiving evidence and making a determination of the remaining issues herein, including in particular, issues concerning remedies.

Let judgment be entered accordingly.

Dated this 16th day of November, 1972.

BY THE COURT:

/s/ William J. Duffy

Circuit Judge

APPENDIX D

STATE OF WISCONSIN CIRCUIT COURT
MENOMINEE COUNTY
Case No. 33

HENRY L. TOMOW, SR., et al.,

Plaintiffs

VS

MENOMINEE ENTERPRISES, INC., et al.,

Defendants

INTERLOCUTORY JUDGMENT
(December 1, 1972)

The Court having made and entered its Findings of Fact and Conclusions of Law herein on November 16, 1972, and having ordered that Interlocutory Judgment be entered in accordance therewith;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That Interlocutory Judgment be had as follows:

1. Principle of *res judicata* does not apply to the instant case based on the two Menominee County Circuit Court cases, *White et al.* v. *Kenote, et al* and *Lakes of the Menominees* v. *Agnes Dick*, because the issues as well as the parties are substantially different.

2. Voting trust is not invalid for a failure to comply with Wisconsin law in that there was a substantial compliance with the purposes of the law.

3. Article XII of the Articles of Incorporation of Menominee Enterprises, Inc., requiring the "affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote" before the Corporation may sell land to non-Menominees is ambiguous as it relates to the period of time during which the Corporation's stock his held by the Voting Trust.

4. The seven conveyances of land made by Menominee Enterprises, Inc., to Lakes of the Menominees, a partnership, prior to the commencement of this action, were made without the necessary approval required by Article XII of the Articles of Incorporation and were an improper exercise of the Corporation's power to convey land and are, therefore, invalid.

5. The seven conveyances of land made by Menominee Enterprises, Inc., to Lakes of the Menominees, a partnership in which Menominee Enterprises held a one-half interest, did not constitute executed corporate transactions but were part of an overall joint venture for the sale of these lands, and therefore sales made subsequent to the commencement of this action and the filing of the Lis Pendens, are subject to the jurisdiction of this court.

6. The Defendants herein shall be enjoined from making any further sales of land to non-Menominees as defined in Exhibit A and B of the Complaint until further order of this Court.

7. The Defendants may carry out the terms of the six contracts for sale which were entered into by the purchasers prior to the commencement of this action and the filing of the Lis Pendens.

8. This judgment shall be interlocutory and a final judgment herein shall be entered following a determination of the remaining issues in this case, including but not limited to, issues concerning remedies as to those sales which occurred prior to the injunction and subsequent to the commencement of this case and the filing of the Lis Pendens.

Dated this 1st day of December, 1972.

BY THE COURT:
/s/ *William J. Duffy*
William J. Duffy
Circuit Court Judge

APPENDIX E

Title 25, United States Code

§893. Membership roll; closure; applications for enrollment; approval or disapproval of application; appeal; finality of determination; final publication; certificates of beneficial interest

At midnight of June 17, 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment: *Provided*, That applicants for enrollment in the tribe shall have three months from the date the roll is closed in which to submit applications for enrollment: *Provided further*, That the tribe shall have three months thereafter in which to approve or disapprove any application for enrollment: *Provided further*, That any applicant whose application is not approved by the tribe within six months from June 17, 1954 may, within three months thereafter, file with the Secretary an appeal from the failure of the tribe to approve his application or from the disapproval of his application, as the case may be. The decision of the Secretary on such appeal shall be final and conclusive. When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be

alienable only in accordance with such regulations as may be adopted by the tribe. June 17, 1954, c. 303, § 3, 68 Stat. 250.

§896. Plan for control of tribal property and service functions; termination of Federal supervision and services; approval of plan; publication in Federal Register

The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. The Secretary is authorized to provide such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan heretofore referred to, including necessary consultations with representatives of Federal departments and agencies, officials of the State of Wisconsin and political subdivisions thereof, and members of the tribe. The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to section 893 of this title, and that it conforms to applicable Federal and State law. In the event the tribe fails to submit a plan approvable under the terms of sections 891-902 of this title by February 1, 1959, the Secretary shall cause such a plan to be prepared and submitted to the tribe within three months thereafter. The tribe shall thereafter have three months within which to accept the plan of the Secretary or to submit to the Secre-

tary tribal proposals for modification. If the Menominee Tribe and the Secretary cannot agree upon a plan within the aforementioned six-month period, or if they agree upon a plan within such period and the tribal corporation and voting trust contemplated by the plan are not established prior to March 1, 1961, the Secretary shall transfer the tribal property to a trustee of his choice for the management or disposition for the benefit of the Menominee Tribe. The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan. The Secretary, after approving the plan, shall cause the plan to be published in the Federal Register. The sustained yield management requirement contained in sections 891-902 of this title, and the possible selection of a trustee in the event of a tribal planning default, shall not be construed by any court to impose a financial liability on the United States. July 17, 1954, c. 303, § 7, 68 Stat. 251; July 14, 1956, c. 604, § 1, 70 Stat. 549; July 2, 1958, Pub.L. 85—488, § 1(b), 72 Stat. 290; Sept. 8, 1960, Pub.L. 86—733, § 1, 74 Stat. 867.